Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

JAMES KING ANDERSON, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

DOES THE SIXTH AMENDMENT RULE EXPRESSED IN MICHIGAN v. JACKSON, 475 U.S. 625 (1986), HOLDING THAT "IF POLICE INITIATE INTERROGATION AFTER A DEFENDANT'S ASSERTION, AT AN ARRAIGNMENT OR SIMILAR PROCEEDING, OF HIS RIGHT TO COUNSEL, ANY WAIVER OF THE DEFENDANT'S RIGHT TO COUNSEL FOR THAT POLICE-INITIATED INTERROGATION IS INVALID," APPLY WHERE THERE HAS BEEN A BREAK IN CUSTODY BETWEEN DEFENDANT'S ARRAIGNMENT AND REQUEST FOR COUNSEL AND THE SUBSEQUENT COMMUNICATION?

II.

DID THE MICHIGAN SUPREME COURT INCORRECTLY CONCLUDE THAT POLICE HAD "INITIATED COMMUNICATION" WITH DEFENDANT, WITHIN THE MEANING OF MICHIGAN v. JACKSON, 475 U.S. 625 (1986), WHERE THE CIRCUIT COURT FOUND THAT POLICE HAD CONTACTED DEFENDANT THE DAY BEFORE HIS ARRAIGNMENT TO MAKE ARRANGEMENTS FOR THE POLYGRAPH EXAMINATION, AND THE POLICE WERE MERELY FINALIZING DEFENDANT'S PRE-ARREST REQUEST FOR A POLYGRAPH EXAMINATION, WHICH RIGHT IS GUARANTEED HIM BY MICHIGAN LAW?

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OPINIONS BELOW

The opinion of the Michigan Supreme Court has not yet been reported and is reprinted in the appendix hereto. App. to Pet. 1a.

The unpublished findings of the Michigan circuit court, on remand from the Michigan Supreme Court, are reprinted in the appendix hereto. App. to Pet. 33a.

The opinion of the Court of Appeals, on remand from the Michigan Supreme Court, has not been reported and is reprinted in the appendix hereto. App. to Pet. 73a.

The opinion of the Michigan Court of Appeals has not been reported and is reprinted in the appendix hereto. App. to Pet. 89a.

JURISDICTION

The Michigan Supreme Court decision was entered on August 26, 1994. Petitioner seeks review of the judgment under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

Amendment VI of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The defendant first came under investigation in this matter on May 19, 1988, as the result of a complaint received by the Kalkaska County Sheriff's Department from the Michigan Department of Social Services. The complaint alleged that defendant had sexually molested his then nine-year-old daughter, Peggy Beaver. (Evidentiary Hearing Tr. 19.)

On May 23, 1988, Detective-Sergeant Bruce Gaultiere met with the defendant at the Kalkaska County Sheriff's Office and confronted him with the allegations made against him. During that conversation, defendant denied the charges and requested that he be allowed to take a polygraph examination. Detective Gaultiere offered to provide transporta-

tion if needed. At the conclusion of the interview, defendant was arrested pursuant to an outstanding warrant for the offense. On May 24, 1988, defendant was released on bond. (Evidentiary Hearing Tr. 19-21, 23; Circuit court findings 2; App. to Pet. 35a.)

On either May 23 or May 24, 1988, Detective Gaultiere requested that a polygraph examination be scheduled for the defendant. On May 25, 1988, he received confirmation that the polygraph could be held on June 2, 1988, and that same day, he left either an oral or written message at defendant's residence informing him of the date of the polygraph and reissuing his invitation to provide transportation if needed. Sometime between May 25 and June 2, 1988,

defendant contacted Detective Gaultiere, stated that he would take the polygraph, and they made arrangements to meet on June 2, 1988, so that Detective Gaultiere could transport defendant to the site of the polygraph test. (Evidentiary Hearing Tr. 23-24; Circuit court findings 2; App. to Pet. 35a-36a.)

On May 26, 1988, defendant was arraigned and counsel was appointed him at that hearing. The defendant made no attempt to contact that attorney prior to the June 2, 1988 polygraph exam or prior to June 6, 1988. (Evidentiary Hearing Tr. 50; Circuit court findings 4; App. to Pet. 36a.)

On June 2, 1988, defendant met Gaultiere and they traveled to the polygraph site together. Once there, defen-

dant was given his full Miranda rights, and he signed a waiver form. Upon leaving the site and returning to Detective Gaultiere's car, Detective Gaultiere told defendant that he wished to speak to him further regarding the charges and asked him if he remembered the rights of which he had just been apprised. In the course of the ride home, Detective Gaultiere then asked defendant several questions, to which defendant responded. Defendant's responses included the statement that he had in the past had sexual thoughts about his daughter but that as soon as he became aware of them he'd attempt to put them out of his head. (Trial Tr. Vol. II, p 49.) The entire elapsed time between defendant's initial Miranda warnings and Detective Gaultiere's questions was approximately two hours. (Evidentiary

Hearing Tr. 23, 25, 28; Circuit court findings 3; App. to Pet. 37a-39a.)

At trial, defendant challenged the admissibility of the statement made to Detective Gaultiere in the car, arguing that it had been elicited in violation of defendant's Sixth Amendment right to counsel. The issue was addressed on a separate record, and the circuit judge found that the statements were admissible at trial because they had been made following a valid waiver of defendant's Miranda rights. (Evidentiary Hearing Tr. 44.)

Defendant was convicted of first-degree criminal sexual conduct, Mich. Comp. Laws, § 750.520b. In an unpublished opinion, the Michigan Court of Appeals affirmed the conviction, holding

that the admission of the statement was not in error, where defendant had not requested counsel during the questioning, and where defendant had been read his Miranda rights and had waived them one hour earlier. (Slip op. at 3; App. to Pet. 102a-103a.)

The Michigan Supreme Court vacated that decision and remanded the case to the Court of Appeals for reconsideration in light of the Michigan Supreme Court's decision in People v. Bladel (After Remand), 421 Mich. 39; 365 N.W.2d 56 (1984), aff'd sub nom. Michigan v. Jackson, 475 U.S. 625 (1986), and to determine, if any error occurred, whether it was harmless. App. to Pet. 87a.

On remand, the Court of Appeals once again affirmed the conviction. Without

addressing the substance of the Sixth Amendment issue, the Court of Appeals held that, regardless, any error was harmless in light of the other evidence against the defendant. (Slip op. at 2-3; App. to Pet. 80a-84a.) The Michigan Supreme Court first denied appeal, App. to Pet. 71a, then granted both a motion for reconsideration and leave to appeal. App. to Pet. 68a.

Following oral arguments, the Michigan Supreme Court, while retaining jurisdiction, remanded the case to the circuit court to conduct an evidentiary hearing in light of People v. Bladel (After Remand), supra, and Patterson v. Illinois, 487 U.S. 285 (1988), and specifically, to determine whether defendant initiated the request for the poly-

graph exam and, if so, whether defendant waived his right to counsel at the polygraph exam and whether the waiver, if any, extended to the subsequent questioning of defendant in the police car. App. to Pet. 58a.

Following an evidentiary hearing, at which Detective Gaultiere was the primary witness, the circuit court found that defendant had initiated the request for a polygraph exam pre-arrest and pre-arraignment but post-custody. (Circuit court findings, 4; App. to Pet. 40a.) The court also found that post-arrest and post-arraignment defendant had "re-initiated or elected to proceed with the polygraph process by doing everything necessary to accomplish the exam." (Id.) The court took special notice of the fact

that defendant "was at liberty at all times after a lawyer was made available to him," and that he had "ample opportunity to consult with counsel and apparently chose not to do it." (App. to Pet. 41a.) The court also found that defendant had validly waived his rights prior to the polygraph, and that this waiver, given the reminder by Detective Gaultiere, carried over to the questioning occurring in the car. (Id. at 8; App. to Pet. 49a-51a.)

The Michigan Supreme Court held that only post-arraignment "initiation" was pertinent and found that Detective Gaultiere had initiated the communication with defendant following his arraignment. (Slip op. at 17-18; App. to Pet. 17a.) The court also found that the error was not harmless. (App. to Pet. 20a.)

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court's decision relied solely on its prior ruling in People v. Bladel (After Remand), 421 Mich. 39; 365 N.W.2d 56 (1984), aff'd sub nom. Michigan v. Jackson, 475 U.S. 625 (1986), and U.S. Const. Amend. VI.

The Michigan Supreme Court has misapplied this Court's decision in Michigan v. Jackson, where the defendant had remained in continuous custody before waiving his right to counsel, to strike down a criminal conviction of a defendant whose waiver followed a break in custody. The Michigan court's expansion of this Court's Jackson rule is neither warranted nor desirable and presents an important question of federal constitutional law which should be reviewed by this Court.

Furthermore, the facts suggest that police officers did not initiate contact with the defendant post-arraignment, that the police's communication with regard to the polygraph test was made prior to defendant's arraignment and, further, that in contacting defendant, the police were merely honoring defendant's pre-arrest request for a polygraph test, which right defendant is guaranteed under Michigan law, Mich. Comp. Laws, § 776.21(5); People v. Sterling, 154 Mich. App. 223, 233-234; 397 N.W.2d 182 (1986).

I.

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE SIXTH AMENDMENT RULE EXPRESSED IN MICHIGAN v. JACKSON, 475 U.S. 625 (1986), HOLDING THAT "IF POLICE INITIATE INTERROGATION AFTER A DEFENDANT'S ASSERTION, AT AN ARRAIGNMENT OR SIMILAR PROCEEDING, OF HIS RIGHT TO COUNSEL, ANY WAIVER OF THE DEFENDANT'S RIGHT TO COUNSEL FOR THAT POLICE-INITIATED INTERROGATION IS INVALID," DOES NOT APPLY WHERE THERE HAS BEEN A BREAK IN CUSTODY BETWEEN DEFENDANT'S ARRAIGNMENT AND REQUEST FOR COUNSEL AND THE SUBSEQUENT COMMUNICATION.

In Jackson, supra, this Court declared that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." (Id. at 636.) The rationale behind this rule is that any waiver of the right to counsel, after a defendant has previously declined to proceed with-

out counsel, is inherently suspect, and it is only a defendant-initiated contact that can overcome the suspect nature of a subsequent waiver of rights, where the defendant's attorney is not present. Michigan v. Harvey, 494 U.S. 344, 350 (1990).

The Jackson rule, although expressed in Sixth Amendment terms, originated in Edwards v. Arizona, 451 U.S. 477 (1981), in the context of the Fifth Amendment right to counsel and was applied to the Sixth Amendment by analogy. Indeed, this Court has stated that, while the Jackson rule is based on the Sixth Amendment, it is actually rooted in Miranda v. Arizona, 384 U.S. 436 (1966). Harvey, supra, at 349. Accordingly, the focus of the Jackson rule is not upon the right to

counsel per se, but rather concerns the manner in which that right, once asserted, may validly be waived.

Because Jackson, like Edwards, focuses upon the concern that those suspects subjected to "prolonged police custody" may be "badgered" into relinquishing their rights, Arizona v. Roberson, 486 U.S. 675, 677 (1988), the continuous custody of the defendant is a vital component of the rule. In each of the pertinent cases reviewed by this Court, under both the Fifth and Sixth Amendments, where this Court has found a police-initiated communication following a request for counsel to invalidate the subsequent waiver of rights, the defendant has been subject to continuous police custody during the intervening

period. See Minnick v. Mississippi, 498 U.S. 146, 148-149 (1990); Roberson, supra, at 678; Jackson, supra, at 627-628; Edwards, supra, at 479.

In the Fifth Amendment context, many jurisdictions have recognized that a break in custody dissolves a defendant's Edwards claim. Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988); McFadden v. Garraghty, 820 F.2d 654, 661 (4th Cir. 1987); United States v. Fairman, 813 F.2d 117, 125 (7th Cir.), cert. denied, 483 U.S. 1010 (1987); United States v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983); People v. Trujillo, 773 P.2d 1086, 1091-1092 (Colo. 1989); State v. Bymes, 258 Ga. 813; 375 S.E.2d 41, 41-42 (Ga. 1989); Brown v. State, 661 P.2d

1024, 1029 (Wyo. 1983); see also, People v. Crusoe, 433 Mich. 666, 670; 449 N.W.2d 641 (1989) (recognizing the continuous custody requirement where a defendant is interrogated on two separate charges) This Court suggested as much in McNeil v. Wisconsin, 501 U.S. 171, 177 (1991), where it stated, with regard to the Edwards rule, "If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial. . . ." (Emphasis added.)

While few jurisdictions have addressed the issue of continuous custody in the Sixth Amendment context, at least

one court has addressed and applied the "break in custody" exception to a Jackson rule analysis. State v. Norris, 244 Kan. 326; 768 P.2d 296, 332 (Kan. 1989). Because of the duality of purpose between the Edwards rule and the Jackson rule, there is no reason for the exception to apply in one instance but not the other.

By disregarding the lack of continuous custody in this case, the Michigan Supreme Court has extended Jackson beyond its intended and desirable parameters. Whatever need there may be for a prophylactic rule when a defendant is subject to continuous custody is simply not present when a defendant has been released on bond and is free to consult with an attorney or friends and family if he chooses to do so.

This Court has recently observed, "To hold a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be 'to imprison a man in his privileges and call it the Constitution.'" Harvey, supra, at 353, quoting Adams v. United States ex rel McCann, 317 U.S. 269, 280 (1942). Similarly, this Court should recognize the autonomy of an individual to elect, intelligently and voluntarily, to proceed without counsel in an instance when the defendant has been free from police custody, when he has had ample time to consult with an attorney, and where he has prior experience with the law. In such circumstances, the prophylactic Jackson rule is neither warranted nor desirable.

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT COMMUNICATION IS NOT "INITIATED" BY THE POLICE WITHIN THE MEANING OF MICHIGAN v. JACKSON WHERE THE POLICE HAD CONTACTED DEFENDANT THE DAY BEFORE HIS ARRAIGNMENT TO MAKE ARRANGEMENTS FOR THE POLYGRAPH EXAMINATION, AND THE POLICE WERE MERELY FINALIZING DEFENDANT'S PRE-ARREST REQUEST FOR A POLYGRAPH EXAMINATION, WHICH RIGHT IS GUARANTEED HIM BY MICHIGAN LAW.

Even were Jackson to apply, the Michigan Supreme Court misconstrued this Court's meaning of the word "initiation" in Jackson in finding that Detective Gaultiere had "initiated" contact with defendant post-arraignment and following his request for counsel. The findings of the circuit court indicate that Detective Gaultiere contacted defendant about the polygraph test on May 25, 1988, the day before defendant's arraignment. Defendant then contacted Detective Gaultiere sometime between May 25 and June 2 to

confirm that he would attend the polygraph examination and to arrange for transportation. The police made no subsequent communication with defendant until Detective Gaultiere picked him up at the arranged spot. Hence, if anyone "initiated" contact post-arraignment it was the defendant. Furthermore, any communications that police did make were merely in regard to arrangements that had been made prior to defendant's arrest and arraignment.

CONCLUSION

The defendant's Sixth Amendment rights were not violated. The break in custody between the prearranged polygraph test, the arraignment and the defendant's subsequent and voluntary contact with the police, at which time he made a statement, with full knowledge of his rights, is completely unrelated to the situation presented in Michigan v. Jackson, supra.

The Michigan Supreme Court incorrectly concluded that the defendant's rights were violated within the meaning of Michigan v. Jackson, supra, where a prearranged meeting with the police for the purposes of taking a polygraph examination, to which the defendant was entitled by state statute, was finalized.

RELIEF

For the foregoing reasons, Petitioner requests that the Writ of Certiorari issue to review the judgment of the Michigan Supreme Court.

Respectfully submitted,

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OPINION

Michigan Supreme Court
Lansing, Michigan

FILED AUGUST 26, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 95406

JAMES KING ANDERSON, III,

Defendant-Appellant.

_____/

BEFORE THE ENTIRE BENCH

AFTER REMAND

RILEY, J.

In this case, we are called upon first to determine whether admission of a postarraignment statement by the defendant violated his Sixth Amendment right to counsel and, second, if it was a violation, whether the admission of this statement and the admission of certain hearsay statements in violation of MRE 803(4) can be deemed harmless errors. With regard to the postarraignment statement, we find that it

was admitted in violation of defendant's Sixth Amendment right to counsel. Moreover, we are not persuaded that this error was harmless and therefore reverse the opinion of the Court of Appeals and remand to the trial court for proceedings consistent with this opinion. In light of this holding, however, we do not find it necessary to independently review whether the hearsay admissions were also harmful.

I. FACTS AND PROCEDURAL HISTORY

Defendant was charged with first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), for allegedly engaging in certain sexual acts with his nine-year-old daughter. On February 10, 1989, a Kalkaska County jury found defendant guilty as charged, and he was sentenced to fifty to seventy-five years

in prison.

The crucial testimony at trial came from the complainant, Detective Bruce Gaultier, social worker Barbara Cross,[1] and defendant.[2] Complainant testified first and stated that the sexual abuse occurred when she visited defendant,[3] her natural father, at Sue Rebone's home during Christmas vacation. Although she testified regarding several occasions of sexual abuse, complainant only specifically discussed the sexual acts of one night.[4]

The alleged sexual conduct occurred at the end of the evening, after complainant retired to sleep in one bedroom, Ms. Rebone to another, with defendant remaining on the living-room couch. During the night, defendant allegedly entered complainant's bedroom

wearing just his underwear. Complainant indicated that he then pulled down his underwear, pulled down her underwear, and raised her nightgown. She then testified to two specific sexual acts during which defendant inserted his finger into her vagina[5] and anus.[6] Each time complainant told defendant to stop because she knew it would hurt.[7] Aside from these two specific sexual references, complainant alluded to defendant inserting his penis in her, but did not explain where he inserted his penis or when this occurred.[8] However, she was certain that it did not occur on the same night as the above two sexual acts.

Both Detective Gaultier and Ms. Cross corroborated these two acts and testified about other, additional sexual

acts spanning, in some cases, years. Detective Gaultier testified first. However, before testifying, the trial judge conducted a midtrial evidentiary hearing to determine the admissibility of certain statements[9] made to Detective Gaultier. The statement crucial to this appeal is defendant's admission that he had sexual thoughts about his daughter, but would immediately clear them from his mind. This statement occurred in a police car when defendant was returning from taking a polygraph examination in another city. At the evidentiary hearing, Detective Gaultier testified that defendant received and waived his Miranda[10] rights one hour earlier at the polygraph examination. Also, before obtaining this statement in the patrol car, Detective Gaultier "asked

[defendant] if he was familiar with his Miranda rights that he had previously waived earlier that day?" On the basis of defendant's Miranda waiver, the judge admitted the statement.[11]

After the jury returned, Detective Gaultier related this statement to the jury. On cross-examination, however, defense counsel presumably attempted to mitigate the prejudice of the statement by eliciting from Detective Gaultier defendant's denial of each of the following allegations: (1) attempting to insert his penis into complainant's vagina, (2) inserting his tongue into her vagina, and (3) putting his penis in her mouth.[12] On redirect examination, the prosecutor, without objection by defense counsel, essentially elicited a detailed recount of every allegation

recorded by Detective Gaultier from his conversations with complainant.[13]

The prosecutor them emphasized this testimony in closing argument:

> Mr. Gaultier . . . was able to list and reiterate from a conversation with [complainant] . . . every single [thing] that you found out today. It's interesting, ladies and gentlemen. Detective Gaultier testified to you that when he was speaking with the defendant, the defendant admits to him he has sexual thoughts about his nine-year-old daughter. That's a very specific descriptive term, sexual thoughts. [(Emphasis added.)]

Following Detective Gaultier's testimony, Ms. Cross confirmed some of the allegations when testifying as an expert in psychiatric social work about the following:[14]

> During that session specifically what she told me was that he tried to stick it in her, is the way she put it. That he put his pinkey [sic] in her, and she was referring to her vaginal area.

* * *

> She told me that her dad had put his penis in her mouth; that he had put vaseline all over her vagina; all over her butt; that he asked her to do the same thing to him and that she had; and she was real upset telling me that, because she felt so guilty and so bad; she told me that he had put his mouth on her vagina; that he had tried to stick it in her; that he had touched her breasts; and that he had told her not to tell anyone or she'd be in trouble if she did.

After the prosecution presented its case, defendant testified and denied all these allegations. He even stated that he did not recall complainant's visit to Ms. Rebone's home on the date in question and suggested that complainant was lying.[15] Nevertheless, the jury convicted defendant as charged.

Defendant appealed in the Court of Appeals, raising several claims of error,[16] only two of which are pertinent to this Court's review: (1) defendant's

claim that it was error requiring reversal to permit Detective Gaultier, in violation of defendant's Sixth Amendment right to counsel, to testify about defendant's statement that he had sexual thoughts about his daughter, and (2) defendant's contention that it was error requiring reversal to allow Ms. Cross, pursuant to MRE 803(4)'s medical treatment hearsay exception, to recount complainant's statements describing the alleged sexual conduct. On September 9, 1991, the Court of Appeals affirmed in an unpublished opinion per curiam (Docket No. 120714), holding that there was no Sixth Amendment violation, but finding Ms. Cross' testimony hearsay but harmless.

In lieu of granting leave to appeal, this Court remanded the case[17] to the

Court of Appeals to consider defendant's statement to Detective Gaultier in light of People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56 (1984), and to determine whether that statement and the hearsay testimony of Ms. Cross were harmless errors.

On remand, in a split decision, the Court of Appeals affirmed the conviction, presuming[18] a Sixth Amendment violation, but deeming this error, as well as the hearsay testimony, harmless. Judge Cavanagh dissented, reasoning that the errors were not harmless.

Defendant again sought leave to appeal in this Court, which was denied on May 14, 1993.[19] On motion for reconsideration, however, this Court granted leave to appeal.[20] After granting an opportunity for full briefing and

argument, this Court, while retaining jurisdiction, ordered a remand to the trial court for an evidentiary hearing regarding defendant's Sixth Amendment right to counsel claim in light of Bladel, supra, aff'd sub nom Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), and Patterson v Illinois, 487 US 285; 108 S Ct 2389; 101 L Ed 2d 261 (1988).[21] Specifically, we ordered the court to determine whether defendant initiated further communications with the police by requesting a polygraph examination, and, if so, whether defendant waived his right to counsel at both the polygraph examination and in the patrol car.

On remand, three witnesses testified, the most pertinent of whom was Detective Gaultier. He clarified

the factual development regarding his initial contact with defendant, defendant's arrest and arraignment, and the arrangements for the polygraph examination. Detective Gaultier testified that before attending the polygraph examination, defendant had been arraigned and requested counsel.[22] Apparently, defendant requested a polygraph examination during an initial interview with Detective Gaultier, before his arrest and arraignment, at which time Detective Gaultier indicated that he would make the arrangements and provide transportation if needed. After being arraigned, appointed counsel, and released on bond, Detective Gaultier contacted defendant regarding the polygraph examination by leaving a message at defendant's residence. Upon receiv-

ing the message, defendant contacted Detective Gaultier and accepted his offer to provide transportation. At the examination, the polygraph examiner obtained defendant's waiver of his Miranda rights by way of a standard waiver form. Moreover, Detective Gaultier reaffirmed defendant's waiver of his Miranda warnings before obtaining the contested statement by asking him whether he remembered his rights being read to him earlier in the day.

On the basis of this information, the trial judge opined that defendant initiated the request for the polygraph examination and properly waived his right to counsel, both at the examination and in the patrol car. Because this Court retained jurisdiction in this matter, the case is again before this

Court.

II. SIXTH AMENDMENT RIGHT TO COUNSEL

We turn first to defendant's claim that the trial court erroneously admitted a statement in violation of his Sixth Amendment right to counsel. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The right to counsel attaches and represents a critical stage "only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment." Bladel, supra at 52. However, the right is invoked only by requesting counsel, usually at postcharge questioning or at arraignment. See Patterson,

supra at 290-291.[23] Therefore, after formal adversarial proceedings have begun and the defendant asserts the right to counsel either at questioning or arraignment, "the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police." Bladel, supra at 66. This rule, as set forth in Bladel and affirmed by the United States Supreme Court in Jackson, supra, is intended to be a bright-line rule, with the only exception being a subsequent initiation by defendant. Jackson, supra at 634.

In the instant case, defendant was arraigned and invoked his right to counsel by requesting counsel at his

arraignment.[24] In terms of falling within the exception set forth in Jackson, we agree that the factual findings below indicate that defendant technically "initiated" or asked to take a polygraph examination, but we are not persuaded that this initiation satisfies the requirements enunciated in Jackson. Indeed, defendant requested the examination before he was arrested or arraigned and, accordingly, before the bright-line rule in Jackson was triggered. Therefore, because defendant's Sixth Amendment right to counsel had not yet attached or been invoked, defendant's request for the polygraph examination could not fall with the Jackson exception.[25] Indeed, after being arraigned and requesting appointed counsel, the general prohibition against further

police interrogation was invoked,[26] absent any subsequent initiation and waiver by defendant.[27]

Applying the bright-line rule in Jackson to the case at bar, it is clear that defendant did not initiate any further communication postarraignment. Instead, Detective Gaultier initiated contact with defendant by leaving the message at defendant's residence, unquestionably in anticipation of further police interrogation, i.e., the polygraph examination and questioning thereafter. Indeed, simply because defendant responded to this message with a desire to endure further questioning does not remedy this problem. Id. at 635, n 9. Thus, with the slate set clean by Jackson, we are persuaded that defendant did not initiate further com-

munications and accordingly, the subsequent interrogation and admission by defendant in the patrol car violated defendant's Sixth Amendment right to counsel and should have been excluded.[28] We now turn to our harmless error analysis.

III. HARMLESS ERROR

An error that violates the federal constitution obliges us to look to federal precedent for the harmless error rule. Chapman v California, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967), and Arizona v Fulminante, 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991).[29] The United States Supreme Court has set forth a two-part inquiry. First, a court must ask if the error is a "structural defect[] in the constitution of the trial mechanism, which def[ies]

analysis by 'harmless-error' standards." Fulminante, supra at 309. These errors include the total deprivation of the right to trial counsel,[30] an impartial judge,[31] excluding grand jury members who are the same race as defendant,[32] denial of the right to self-representation,[33] denial of the right to a public trial,[34] and a constitutionally improper reasonable doubt instruction.[35] Upon finding any of these errors, a court must automatically reverse.

At the other end of the spectrum, however, are trial errors that "occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."

Fulminante, supra at 307-308. This requires the beneficiary of the error to prove,[36] and the court to determine, beyond a reasonable doubt that there is no "'reasonable possibility that the evidence complained of might have contributed to the conviction.'" Chapman, supra at 23.

While the instant error does not justify automatic reversal as a structural error that infects the entire trial mechanism, it is a trial error occurring during the presentation of the case to the jury and thereby subject to a harmless error analysis. Accordingly, applying the federal harmless error test, we do not find this error harmless beyond a reasonable doubt.

We reach this conclusion after examining the entire record and considering

both the statement itself and its subsequent emphasis in closing argument. There is no doubt that a father in admitting that he is having sexual fantasies about his daughter is making an inculpatory and highly prejudicial admission. Realizing the probative value of this admission, the prosecutor capitalized on the admission in closing argument:

> It's interesting, ladies and gentlemen. Detective Gaultier testified to you that when he was speaking with the defendant, the defendant admits to him he has sexual thoughts about his nine-year-old daughter. <u>That's a very specific descriptive term, sexual thoughts</u>. [(Emphasis added.)]

Considering the obvious prejudicial and inculpatory nature of this statement, the emphasis in closing argument, and the lack of other, admissible corroborating evidence in this

credibility contest,[37] we cannot conclude beyond a reasonable doubt that this inadmissible evidence did not tip the scale in favor of the prosecution and contribute to the jury's verdict. Instead, we find it reasonable to believe that this evidence affected the jury's decision to convict.

IV. CONCLUSION

Because we have concluded that the Sixth Amendment error independently requires reversal, we need not consider whether the admission of the hearsay statements[38] were also harmful.[39] Instead, we rely on the Sixth Amendment violation as the basis for reversing the opinion of the Court of Appeals and remanding the case to the trial court for proceedings consistent with this opinion.

---

[1]Complainant first came in contact with Ms. Cross after her mother and stepfather discovered that her two stepbrothers were sexually molesting her. During a counseling session with Ms. Cross, complainant stated that defendant also molested her. Ms. Cross immediately informed the authorities after which she continued counseling complainant with these later sessions producing the inadmissible hearsay testimony at issue in the instant case.

[2]The remaining witnesses did not testify regarding any acts of sexual abuse by defendant.

First, complainant's mother testified about the sexual abuse by complainant's stepbrothers, thereby explaining the need for counseling with Ms. Cross. She also explained why these initial allegations were not relayed to defendant, her natural father.

Second, Dr. Douglas Newman, the family physician, testified about complainant's frequent urinary and vaginal infections, as well as bed-wetting. Although Dr. Newman did not notice anything unusual with her hymen, he indicated that the insertion of a tongue, penis, or finger could leave the hymen intact. Similarly, the use of vaseline into the anus might cover any visible effects. Dr. Newman also indicated that the urinary infections could have been caused by vaginal irritation or masturbation. In fact, Dr. Newman stated that complainant's mother reported her fre-

quent masturbation. Nonetheless, he did not testify regarding any physical evidence of sexual abuse or actual knowledge of sexual abuse.

The remaining witness was defendant's character witness, Lisa Trobaugh, a friend of defendant. She testified that defendant had lived with her and her husband at their home for several years, where complainant often visited the defendant. Ms. Trobaugh stated, however, that complainant and defendant never slept in the same room together and that complainant never appeared upset on these visits.

Accordingly, the only testimony regarding the specific sexual acts came from complainant, Ms. Cross, and Detective Gaultier. Defendant denied every allegation.

[3]At the time of the alleged sexual conduct, complainant was living with her mother and stepfather. It was at this residence that complainant's stepbrothers sexually molested her.

[4]On this night, defendant, Ms. Rebone, and complainant viewed two children's videos and one adult video. During this time, defendant allegedly became intoxicated from drinking vodka.

[5]Complainant specifically stated that defendant inserted his pinkie into her vagina. Complainant then explained that she knew it was his pinkie because he had done this on previous occasions.

[6]Complainant described this later event in detail by stating that defen-

dant instructed her to roll over upon which defendant rubbed vaseline all over her buttocks. Defendant then inserted his finger, although she did not specify which finger as she had done in regard to her vagina.

[7]Defendant eventually fell asleep and then "wet" the bed. Complainant explained that defendant often wets the bed when he has been drinking. In fact, she indicated that he had wet her bed on other occasions.

[8]There were two points in the record where the prosecutor tried to elicit testimony from complainant regarding conduct involving defendant's penis:

> Q. Now do you remember your dad trying to do anything with his penis that night?
>
> A. No.
>
> * * *
>
> Q. Now you said your dad had done things to you before, is that true?
>
> A. Yes.
>
> Q. Things like he did this night?
>
> A. Yes.
>
> Q. Okay, has he ever tried to put his penis in you?
>
> A. Yes.
>
> Q. Do you remember when the last time was?

A. No.

[9]The judge considered the admission of three statements, the first two of which are not subject to this appeal.

[10]Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[11]The judge also held that the statement could "be reasonably construed to be an admission against his interests under the exception of the hearsay rule, 804(B)(3)."

[12]Complainant did not previously testify about any of these allegations, but simply alluded to conduct involving defendant's penis. See n 8.

[13]This testimony consisted of the complainant (1) describing defendant's penis in the erect position and defendant forcing her to rub his penis, (2) defendant rubbing her vagina with his hand, (3) describing the taste of urine and semen as sour, (4) describing the pain she felt when defendant attempted to insert his penis in her vagina, and (5) describing similar events aside from the one night in January, including when the family lived in other states, and also the previous year when she was in second grade.

[14]Ms. Cross began to explain what specific sexual acts transpired when defense counsel objected to this testimony as hearsay. The trial judge overruled his objection and allowed her to testify on the basis of MRE 803(4)'s medical treatment exception to the hearsay rule.

[15]Defendant denied that he ever rents adult videos and, regardless, would never allow his daughter to view them.

[16]Defendant claimed that the trial court erred in finding complainant competent to testify, in admitting testimony of other instances of sexual relations between him and the complainant, and in instructing the jury. Defendant also alleged that certain prosecutorial misconduct denied him a fair trial. These claims of error were not pursued in this appeal, and we therefore express no opinion in regard to their merit.

[17]439 Mich 1000 (1992).

[18]The Court of Appeals stated:

> Upon examination of the record, we conclude that there is insufficient evidence to determine conclusively whether defendant waived his Sixth Amendment right to counsel prior to giving the statement at issue. Due to the inadequate development of the record, we presume that defendant did not waive his Sixth Amendment rights and therefore the statement at issue was taken in violation of those rights. Notwithstanding our presumption that the statement was taken in violation of defendant's Sixth Amendment right to counsel, we hold that the error was harmless beyond a reasonable doubt. [Unpublished opinion per curiam, issued November 23, 1992 (Docket No. 152135).]

[19]442 Mich 908 (1993).

[20]442 Mich 874 (1993).

[21]444 Mich 965 (1994).

[22]At the midtrial evidentiary hearing, Detective Gaultier testified that he was unaware whether counsel was appointed. On remand, however, Detective Gaultier seemed to indicate that he was aware that counsel was appointed.

[23]In Patterson, the defendant did not request counsel and therefore did not invoke the right to counsel even though he was indicted. The Court held that indictment does not trigger the invocation of the right to counsel and therefore does not trigger the ban against further police questioning. Id. at 291.

[24]Although we do not have a transcript of the arraignment, the record contains a form signed by defendant specifically requesting the appointment of counsel. Accordingly, there is no question that defendant invoked his right to counsel. Cf. Montoya v Collins, 955 F2d 279, 282-283 (CA 5, 1992).

[25]Accordingly, any communications made before the Sixth Amendment right to counsel had attached and been invoked--whether initiated by defendant or not--are irrelevant for purposes of the Jackson exception regarding whether he initiated further communications with respect to the Sixth Amendment right to counsel inquiry.

[26]While the record appears to be unclear whether Detective Gaultier knew of defendant's appointed counsel, Jackson makes clear that "[o]ne set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." Id. at 634.

[27]See, e.g., Smith v Illinois, 469 US 91; 105 S Ct 490; 83 L Ed 2d 488 (1984).

[28]In light of our finding that there is a violation of Jackson, it becomes unnecessary for us to determine whether defendant waived his right to counsel. As stated earlier, this is a two-step inquiry: (1) did defendant initiate further communication, and, if so, (2) did he waive his Sixth Amendment right to counsel. Failing the former, the Court need not consider the latter.

29

> The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed [by the federal constitution] . . . . Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness

> to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent--expressly created by the Federal Constitution itself--is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule. [Chapman, supra at 21.]

The Court actually formulated part of the harmless error test in Fahy v Connecticut, 375 US 85, 86-87; 84 S Ct 229; 111 L Ed 2d 171 (1963); however, it was never clear whether this was a federal harmless error rule or state harmless error rule. Chapman later confirmed that this is the federal harmless error rule and further defined the burden of persuasion needed to show the causal effect on the jury.

[30]Gideon v Wainwright, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[31]Tumey v Ohio, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927).

[32]Vasquez v Hillery, 474 US 254; 106 S Ct 617; 88 L Ed 2d 598 (1986).

[33]McKaskle v Wiggins, 465 US 168; 177-178, n 8; 104 S Ct 944; 79 L Ed 2d 122 (1984).

[34]Waller v Georgia, 467 US 39, 49, n 9; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

[35]Sullivan v Louisiana, 508 US ___; 113 S Ct 2078; 124 L Ed 2d 182 (1993).

[36]The Chapman Court explained the burden of proof in the following manner:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in Fahy [n 32 supra], about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. [Id. at 24.]

[37]While credibility contests are not uncommon in criminal sexual conduct cases, People v LaLone, 432 Mich 103, 117; 437 NW2d 611 (1989) (Brickley, J.); People v Straight, 430 Mich 418, 427; 424 NW2d 257 (1988), the wrongful admission of corroborating testimony "on either side could tip the scales" and

result in harmful error. People v Gee, 406 Mich 279, 283; 278 NW2d 304 (1979).

[38]We note that defendant also attempted to frame this error as a constitutional error in violation of the federal Sixth Amendment Confrontation Clause. However, we find difficulty in concluding that defendant's confrontation rights were violated because the declarant testified and was available for cross-examination. See Idaho v Wright, 497 US 805; 110 S Ct 3139; 111 L Ed 2d 638 (1990); People v Poole, 444 Mich 151, 162-163; 506 NW2d 505 (1993). Regardless, however, we do agree that the testimony clearly violated our interpretation of MRE 803(4) in LaLone, supra, and must be avoided at retrial.

[39]Accordingly, we save for another day, after full briefing and argument, the distinction between, and the enunciation of, the constitutional harmless error test and Michigan's nonconstitutional harmless error test.

STATE OF MICHIGAN
46TH JUDICIAL CIRCUIT COURT,
KALKASKA COUNTY

THE PEOPLE OF THE STATE OF MICHIGAN Appellee	)	
v	)	SC: 95406
	)	COA: 152135
JAMES KING ANDERSON III	)	LC: 88-905-FC
Defendant/Appellant	)	

MARK S. MACKLEY (P38847)
Prosecutor

JEANICE DAGHER-MARGOSIAN (P35933)
Attorney for Defendant/Appellant

OPINION

At a session of said Court,
held in the Village of Kalkaska,
Michigan, on the 17th day of May, 1994.

Following an evidentiary hearing held in this Court and cause on May 12, 1994, pursuant to order of the Michigan Supreme Court entered March 25, 1994, the Court makes the following findings of fact:

Commencing May 19, 1988, Detective Sergeant Bruce Gualtiere of the Kalkaska County Sheriff's Department began an investigation of James King Anderson as a result of a complaint of criminal sexual conduct lodged by the Department of Social Services.

By May 23, 1988, Gualtiere had obtained a warrant for Anderson's arrest. On May 23, 1988, Gualtiere interviewed Anderson at the Sheriff's Department commencing at 9:45 a.m. Gualtiere did not Mirandize Anderson prior to the interview nor did he tell him that he had a warrant for his arrest. Anderson was not served with the arrest warrant until after the interview was concluded. Early on in the interview, Anderson requested a polygraph interview and Gualtiere agreed

to arrange one. Anderson's request took Gualtiere by surprise and effectively ended the interview. When the interview ended, Anderson was arrested. On May 24, 1988, Anderson posted bond according to the District Court file.

Gualtiere requested a polygraph exam from the State Police in Gaylord, Michigan, on May 23rd or 24th but had to wait for a confirmation of a date and time. On May 25th, Gualtiere was given a June 2, 1988 date for the exam. That same day Gualtiere left an oral or written message of the exam date with someone other than Anderson at Anderson's residence, along with instructions to notify Gualtiere if Anderson required transportation to the exam site. Sometime prior to June 2nd, Anderson notified Gualtiere that he would avail

himself of the offer for transportation.

On May 26, 1988, Anderson was arraigned on the complaint in District Court and Attorney Robert Carey, of Kalkaska, was appointed to represent him. Carey had no direct contact with his client until June 6, 1988. At that initial meeting, Carey recognized he had a conflict of interest with a pending probate action. He informed Anderson of his inability to represent him and proceeded to withdraw as counsel. At an earlier pre-pretrial meeting between Carey and the prosecuting attorney on June 2, 1988, at which Anderson was not present, there was no discussion of the polygraph then in progress. There is no indication that either lawyer knew about the polygraph.

On June 2, 1988, Anderson met

Gualtiere at the Sheriff's Department and was transported to Gaylord for a polygraph exam conducted by Michigan State Police polygraph examiner Michael McMasters. The exam was scheduled for 1:00 p.m., and the parties arrived at approximately 12:45 p.m.

The exam was conducted in a commercial building (not the State Police Post) in a suite of offices rented for polygraph purposes. Anderson was brought to the examination room at 2:08 p.m., and McMasters proceeded to take a brief personal history. At 2:10 p.m., McMasters gave Anderson the Miranda rights, warning, waiver and acknowledgement embodied in Plaintiff's Exhibit 1 attached. McMasters read the rights to Anderson while Anderson followed along from a duplicate sheet. Anderson filled

in the blanks in the waiver section and signed the form. The advice of rights recited apparently took six minutes. During this process, Anderson told McMasters that he did have an attorney named "Karrie" (sic). McMasters explained Anderson's right to not proceed without counsel or to stop at any time to contact and consult with counsel. No other or special rights were given. McMasters did not specifically articulate for Anderson the potential perils of proceeding without counsel. The examination proper commenced at 3:19 p.m. and concluded at 3:42 p.m. During the course of the examination, Anderson made no request to stop the process or to consult with counsel.

Gualtiere spent some time following

the polygraph talking with McMasters out of Anderson's presence.

When Gualtiere and Anderson got in the car for the return trip and while still in the parking lot, Gualtiere told Anderson he wanted to talk further with him about the case and his polygraph test results. Gualtiere asked Anderson if he recalled the Miranda rights previously given to him by McMasters and told Anderson they were still in effect. Anderson responded that he recalled the rights and understood they remained in effect and agreed to talk to Gualtiere. Within the first fifteen minutes of the return trip and approximately one hour from the conclusion of the polygraph examination, Anderson made the statement under scrutiny by the Court.

In response to the Supreme Court's

specific question, this Court finds that Anderson did initiate the request for a polygraph examination, pre-arrest and pre-arraignment but post-custody under the circumstances previously set forth.

Post-arrest and post-arraignment, Anderson reinitiated or elected to proceed with the polygraph process by doing everything necessary to accomplish the exam. Anderson was out of jail on May 24th. He was in court and given a lawyer on May 26th. He had no contact with Gualtiere other than indirect communication regarding transportation between May 24th and June 2nd, a space of nine days. If Anderson did not wish to proceed, all he had to do was not appear. To the contrary, he was assiduous (sic) about following through on arrangements for transportation and being at the

appointed place at the appointed time to accomplish the polygraph exam.

There is no evidence that Anderson made any attempt to contact his lawyer after one was made available to him on May 26th prior to the June 6th meeting which was scheduled by the lawyer.

Unlike any of the defendants in People v Bladel, 421 Mich 29 (1984); Michigan v Jackson, 475 US 625 (1986) or Patterson v Illinois, 487 US 285 (1988), Anderson was at liberty at all times after a lawyer was made available to him. He had many days within which to elect to follow a course different than the one he pursued. Anderson had ample opportunity to consult with counsel and apparently chose not to do it.[1]

The Bladel Court stated at page 65: "We decline to follow the reasoning of

those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of Miranda rights." In this case, the Defendant had the benefit of more than a bare recitation of Miranda warnings as reflected by Plaintiff's Exhibit 1. Of more importance is the subsequent analysis of the same issue by the United States Supreme Court in Patterson, supra, 487 US 294-298; 108 S Ct 2395-2397:

> "... The Miranda warnings also served to make petitioner aware of the consequences of a decision by him to waive his Sixth Amendment rights during post-indictment questioning. Petitioner knew that any statement that he made could be used against him in subsequent criminal proceedings. This is the ultimate adverse consequence petitioner could have suffered by virtue of his choice to make uncounseled admissions to the authorities. This warning also sufficed -- contrary to petitioner's claim here ... to let petitioner know what a lawyer could "do for him" during the post-indictment questioning: namely,

advise petitioner to refrain from making any such statements. By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, petitioner was essentially informed of the possible consequences of going without counsel during questioning.

...

"Our conclusion is supported by petitioner's inability, in the proceedings before this Court, to articulate with precision what additional information should have been provided to him before he would have been competent to waive his right to counsel.... Under close questioning on this same point at argument, petitioner likewise failed to suggest any meaningful additional information that he should have been, but was not, provided in advance of his decision to waive his right to counsel. The discussions found in favorable court decisions on which petitioner relies are similarly lacking.

"As a general matter, then, an accused who is admonished with the warnings prescribed by this Court in Miranda, 384 US at 479; 86 S Ct at 1630, has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.

We feel that our conclusion in a recent Fifth Amendment case is equally opposite here: "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." See Moran v Burbine, 475 US, at 422-423; 106 S Ct at 1142.

"We consequently reject petitioner's argument, which has some acceptance from courts and commentators that since "the Sixth Amendment right [to counsel] is far superior to that of the Fifth Amendment right," and since "[t]he greater the right the greater the loss from a waiver of that right," waiver of an accused's Sixth Amendment right to counsel should be "more difficult" to effectuate than waiver of a suspect's Fifth Amendment rights.... While our cases have recognized a "difference" between the Fifth Amendment and Sixth Amendment rights to counsel, and the "policies" behind those constitutional guarantees, we have never suggested that one right is "superior" or "greater" than the other, nor is there any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart." 108 S Ct 2389, 2395-2397.

Bladel stops short of requiring that the defendant actually consult with counsel or that counsel be present before the defendant can initiate contact with the police for purposes of making a statement. Bladel, supra, 65-66.

Here counsel was made available to Anderson by the Court. Anderson was on bond and had nine days to contact and consult with counsel if he had chosen to do so. Anderson reinitiated communications with the police while out of the presence of law enforcement personnel and free to avoid them. Anderson knew he had a lawyer and announced that fact and provided his lawyer's name to Trooper McMasters. Anderson then, freely, voluntarily, knowingly and intelligently waived his right to have

his lawyer present or contact his lawyer in any fashion prior to giving a statement.

This is the unrefuted testimony of Trooper McMasters:

"A This Rights form is used to advise what's known as the Miranda Warning; to tell the person that they have a right to remain silent, that they don't have to say anything, that anything they do say will be used against them in Court. He has a right to have an attorney and if he can't afford an attorney, one will be appointed for him. And then, he has to -- we have to be certain that he understood those rights. And, if he understands them, is he willing to waive those rights and talk to me about the case.

Q All right. Can you tell me specifically, Mr. McMasters, how that form is used? Is it read to him, or...

A It is read to him.

Q All right. Does he -- is he afforded the opportunity to read along with you?

"A Yes. He has a copy in his hand while I read this particular form to him.

Q All right. Now, you read the form to him?

A Yes, I did.

Q Okay. And were you satisfied that he understood what you read to him?

A Yes, I was.

Q All right. And he informed you, did he not, that he had been appointed an attorney?

A Yes, he did.

Q And did he give you a name?

A Yes, he did.

Q And what name did he give you?

A Attorney Carey.

Q All right. What did you do after learning that he had an attorney?

A When he advised me that he had an attorney by the name of Mr. Carey, I told him that just because Mr. Carey wasn't present in the building with us, that didn't mean that he didn't have the right to talk to Mr. Carey. And, if at any time he decided that he needed to, or wanted to consult with Mr. Carey, we would stop and we would go to a phone and we would call Mr. Carey and he could counsel with Mr. Carey

over the telephone. And, if we couldn't get a hold of Mr. Carey, we would stop the proceeding until he did get a hold of him and did have the opportunity to talk to Mr. Carey."

(Evidentiary Hrg. Transcript, page 9, line 2 through page 10, line 18)

...

"Q All right, And in -- during the course of your examin--your initial discussion with Mr. Anderson, did he at any time stop you and request to consult with Mis--with Mr. Carey or any other attorney?

A No.

Q All right. And during the course of the polygraph, which began at approximately 3:19, and ended at 3:42; did Mr. Anderson stop you, at all, and request to consult with Mr. Carey or any other attorney.

A No.

MR. MACKLEY: That's all I have of this witness, Judge.

"THE COURT: All right. Ms. Margosian.

CROSS-EXAMINATION

BY MS. DAGHER-MARGOSIAN:

Q Mr. McMasters, you've said that when the Defendant advised you that he had a lawyer, you then told him, "We can call your lawyer and you can talk to your lawyer before we continue." Is that correct?

A Yes; that he could stop and -- the proceedings until he consulted with his attorney, whether it was by phone or whether he got a hold of him personally, or however we made the arrangements.

Q Okay. That was the extent of the rest of your discussion concerning his attorney. Is that correct?

A Yes.

Q Okay."

(Evidentiary Hrg. Transcript, page 14, line 6 through page 15, line 7)

This court concludes that Anderson waived his Fifth and Sixth Amendment rights prior to making any statements for polygraph purposes.

The Court further concludes that Anderson, voluntarily, knowingly and

intelligently waived his Fifth and Sixth Amendment rights immediately prior to making the statement complained of in the patrol car to Det. Sgt. Gualtiere. In support of this conclusion, the record reflects that Anderson was given the Miranda warnings commencing at 2:10 p.m. and ending at 2:16 p.m. The polygraph exam concluded at 3:42 p.m. Following the polygraph, McMasters and Gualtiere spent some time talking, which the Court estimates at fifteen to thirty minutes. Following that communication, Anderson and Gualtiere got in the car to begin the return trip and Gualtiere reminded Anderson of his rights. Within fifteen minutes of that exchange, Anderson made his statement. The total elapsed time from the full recitation of Miranda rights was approximately two

hours and fifteen minutes. It strains credulity, especially given the intervening reminder by Gualtiere, that Anderson would forget his rights within that time span. Further, Anderson had no reason to be anything less than on guard with Gualtiere, who, after all, had arrested him for this felony eleven days earlier.

The Clerk is directed to return this file to the Michigan Supreme Court for further proceedings.

/s/
ALTON T. DAVIS, Circuit Judge
May 17, 1994

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[1]While not of record, the Court notes that according to the 1993-1994 Michigan Manual, the 1990 population of Kalkaska County was 13,497. The population of the Village of Kalkaska was 1,952. The 1992 Attorney Listing for the 46th Judicial Circuit published by Northwest Reporting lists five attorneys in Kalkaska County, including the prosecuting attorney.

PLAINTIFF'S EXHIBIT 1

NAME OF EXAMINEE James King Anderson III

RIGHTS

1. You have the right to refuse this examination.
2. You cannot be discharged from employment solely because you so refuse this examination.
3. You cannot be denied employment solely because you refuse this examination.
4. You have the right to halt this examination at any time.
5. You are not required to answer any questions or give any information.
6. Any information you volunteer will be used against you, or made available to the party requesting this examination, unless otherwise specified and agreed to in writing.

MIRANDA WARNING

1. You have the right to remain perfectly silent.
2. Anything you say will be used against you in court.
3. You have the right to talk to a lawyer and have him or her present with you before or during any questioning, or available to you at any time during this examination.
4. If you want a lawyer but cannot afford one, one will be appointed to represent you at public expense.
5. If you waive your right to remain silent and later wish to stop answering questions, the questions will stop.
6. If you waive your right to have a lawyer present and later change your mind, the questioning will stop until you have talked with a lawyer.

WAIVER

1. Do you understand each of these right that I have explained to you? Answer yes

2. Are you willing to give up these rights and answer my questions at this time? Ans. yes

ACKNOWLEDGEMENT

1. I am willing to take a polygraph examination consisting of a testing phase with questioning before and after.

2. I understand that I have the right to remain silent and that anything that I say before the test, during the test, or after the test can be used against me in a court of law. I further understand that I may exercise my right to remain silent and stop answering questions at any

time.

3. I understand that the polygraph examination cannot be conducted with a lawyer actually present in the examination room, and I am willing to waive his or her presence. However, I fully understand that I have the right to talk with and have the assistance of a lawyer at any time during the polygraph examination, and that I may stop the examination or questioning at any time and exercise my Miranda rights that have been explained to me.

4. No promises or threats have been made to me and no pressure of any kind has been used against me.

5. This statement has been read to me and I understand each of my rights and I am willing to waive these

rights and take this polygraph examination at this time.

SIGNED /s/James K. Anderson

DATE 6/7/88 TIME 2:16

WITNESS /s/ M McMasters

Michigan Supreme Court
ORDER Lansing, Michigan

Entered: March 25, 1994

8 January 1994

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, SC: 95406
v COA: 152135
LC: 88-905-FC

JAMES KING ANDERSON, III,

Defendant-Appellant.
_____/

In defendant's first appeal to this Court, we remanded[1] to the Court of Appeals to consider defendant's statement to Detective Gaultier in light of People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56 (1984), and to determine whether that statement and the hearsay testimony of Ms. Cross were harmless errors.

Upon remand, in a split decision, the Court of Appeals affirmed the con-

viction, presuming[2] a Sixth Amendment violation, but deeming this error, as well as the hearsay testimony, harmless.

Defendant again sought leave to appeal to this Court which was denied on May 14, 1993.[3] On motion for reconsideration, however, this Court granted leave.[4]

This case now having been argued and submitted, and this Court having reviewed the record, we REMAND to the Kalkaska Circuit Court and direct the court to conduct an evidentiary hearing regarding the status of defendant's Sixth Amendment right to counsel claim in light of People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56 (1984), aff'd sub nom Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L

Ed 2d 631 (1986), and Patterson v Illinois, 487 US 285; 108 S Ct 2389; 101 L Ed 2d 261 (1988). Specifically, we order the court to determine whether defendant initiated the request for the polygraph exam. If the court finds that defendant did not initiate the request, then this case should be returned to this Court for further proceedings. However, if defendant initiated the request, then the court is directed first to determine whether defendant waived his Sixth Amendment right to counsel at the polygraph exam and second, whether the waiver, if any, extends to the subsequent questioning of defendant in the police car.

The findings of the Kalkaska Circuit Court are to be filed with the Clerk of this Court within 60 days after the entry of this order.

We retain jurisdiction.

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[1] 439 Mich 1000 (1992).

[2] The Court of Appeals stated:

> Upon examination of the record, we conclude that there is insufficient evidence to determine conclusively whether defendant waived his Sixth Amendment right to counsel prior to giving the statement at issue. Due to the inadequate development of the record, we presume that defendant did not waive his Sixth Amendment rights and therefore the statement at issue was taken in violation of those rights. Notwithstanding our presumption that the statement was taken in violation of defendant's Sixth Amendment right to counsel, we hold that the error was harmless beyond reasonable doubt. [Unpublished opinion per curiam, decided November 23, 1992 (Docket No. 152135).]

[3] 442 Mich 908.

[4] 444 Mich 874 (1993).

Levin, J. (dissenting). Under the circumstance that People v Bladel (After Remand), 421 Mich 39 (1984), aff sub nom Michigan v Jackson), 475 US 625 (1986), was decided five years before the defendant's trial, it is, I believe, incumbent on the majority to justify remand to the trial court "to conduct an evidentiary hearing regarding the status of defendant's Sixth Amendment right to counsel claim in light of" Bladel and Patterson v Illinois, 487 US 285 (1988).1

Many a litigant would like an opportunity, five years after a jury's verdict has been rendered, to go back and expand upon the record made at the time of trial. Ordering a remand for that purpose is unusual and requires, I believe, some explanation why this case

is different than all or most other cases.

The order states that if the trial court "finds that defendant did not initiate the request [for a polygraph examination], then this case should be returned to this Court for further proceedings." But is [sic] also states "[w]e retain jurisdiction." The order should make clear that the case returns to this Court for further proceedings without regard to whether the trial court finds that the defendant initiated the request or did not initiate the request.

Since the order asks "whether the waiver, if any, extends to the subsequent questioning of defendant in the police car," I take it that the remand order does not permit expansion of the

record regarding what occurred on the return trip from Gaylord. To that extent, I agree with the order.

In all events, the citation of Patterson, supra, is potentially misleading. In Patterson, the Court held that a suspect who has been read his Miranda[2] rights and then confesses to a crime can be said to have waived his Sixth Amendment right to counsel as well as his Fifth Amendment right to counsel. Thus, the same standard applies to determine whether an accused has waived his Fifth and Sixth Amendment rights to counsel. To the extent the majority wishes to make this limited point, the citation of Patterson[3] is not potentially misleading.[4]

Patterson says nothing about the issue in the instant case, namely,

whether a defendant has waived his Sixth Amendment right to counsel when he provides a statement after a polygraph operator informs him of his Miranda rights and after a different officer asks him in a different environment whether he is "familiar with" the warnings he had received earlier.

---

[1] Patterson was also decided before the defendant's trial.

[2] Miranda v Arizona, 384 US 436 (1966).

[3] Patterson is not, however, relevant in light of the following footnote:

> We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. See Maine v Moulton, 474 US 159, 176 (1985). The State conceded as much at argument. See Tr. of Oral Arg. 28.

> Indeed, the analysis changes markedly once an accused even requests the assistance of counsel. See Michigan v Jackson, supra; Part II-A, infra. [Id. at 290, n 3.]

In the instant case, the defendant had an attorney at the time of the questioning. Thus, Patterson's holding regarding the standards for waiver of the Fifth and Sixth Amendment right to counsel may not apply.

[4] In Patterson, the defendant had been indicted for murder. After his indictment, he gave a statement to a police officer immediately after he had been given and had initialed a form containing Miranda warnings. Later that same day, the defendant gave another inculpatory statement to a prosecuting attorney. Before giving this second statement, the defendant reviewed the written waiver of rights he had signed earlier, and he again placed his initials next to the written statement of each of his rights. He also signed another waiver form before giving this second statement. The Supreme Court held that because the defendant gave his statement immediately after having been informed of his Miranda rights, he had waived his Sixth Amendment right to counsel concerning his statement.

Cavanagh, C.J., joins in the statement by Levin, J.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 25, 1994 /s/Corbin R. Davis
Clerk

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: November 1, 1993

95406(27)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KING ANDERSON, III,

Defendant-Appellant.
_____/

SC: 95406
COA: 152135
LC: 88-905-FC

On order of the Court, the motion for reconsideration of this Court's order of May 14, 1993, is considered, and it is GRANTED. On reconsideration, the application for leave to appeal is again considered, and it is GRANTED.

The defendant is directed to file with the Kalkaska Circuit Court an affidavit concerning his present financial status (see guidelines at 387 Mich xxxi). The Kalkaska Circuit Court must provide the prosecutor with a copy of the defen-

dant's affidavit. The prosecutor may challenge the defendant's assertion of indigency by filing an appropriate motion with the Kalkaska Circuit Court within 14 days after the prosecutor receives the copy of the affidavit. If such challenge is brought, the Kalkaska Circuit Court must conduct a hearing on the matter within 21 days after the prosecutor's motion is filed. The prosecutor, the defendant, and an attorney appointed by the Kalkaska Circuit Court to represent the defendant must appear at the hearing.

If the Kalkaska Circuit Court determines that the defendant is indigent, the Court must continue the appointment of counsel within 14 days after the hearing or, if the prosecutor has not challenged the defendant's assertion of indigency, within 28 days after the defendant files

his affidavit. The Kalkaska Circuit Court must promptly forward to the Clerk of this Court a copy of the appointment order and must promptly provide counsel with any portion of the record that counsel requires.

If the Kalkaska Circuit Court determines that the defendant is not indigent, the Kalkaska Circuit Court must promptly notify the Clerk of this Court.

Appellant's brief and appendix shall be filed no later than December 6, 1993 and appellee's brief, and appendix, if any, shall be filed no later than December 27, 1993.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 1, 1993 /s/Corbin R. Davis
Clerk

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: May 14, 1993

95406

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KING ANDERSON, III,

Defendant-Appellant.

SC: 95406
COA: 152135
LC: 88-905-FC

/

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Brickley, J., would grant leave to appeal.

Levin, J., states as follows:

I would grant leave to appeal to consider the harmless error issue. The Court of Appeals, on remand from this Court, found that the record was insuf-

ficient to "determine conclusively whether defendant waived his Sixth Amendment right to counsel prior to giving the statement at issue," and "presume[d] that defendant did not waive his Sixth Amendment rights and therefore the statement at issue was taken in violation of those rights." The hearsay statement of another witness had been found to be inadmissible on the earlier submission to the Court of Appeals. I am inclined to agree with the judge of the Court of Appeals who dissented that the errors may have prevented the defendant from receiving a fair trial.

Cavanagh, C.J., concurs in the dissenting statement of Levin, J.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 14, 1993 /s/ Jacqueline B. MacKinnon
Deputy Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KING ANDERSON, III,

Defendant-Appellant.

---/

November 23, 1992

No. 152135
ON REMAND

Before: Doctoroff, C.J., and Brennan and Cavanagh, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court. Initially, we affirmed defendant's conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)a), and subsequent sentence of 50 to 75 years in an unpublished per curiam opinion. See People v Anderson, unpublished opinion per curiam of the Court of Appeals, decided September 9, 1991

(Docket No. 120714). Once again, we affirm.

Defendant's conviction arises out of allegations that he sexually assaulted his young daughter. During the course of the three-day jury trial, a witness named Barbara Cross testified. Cross was qualified as an expert in the area of psychiatric social work, and gave defendant's daughter support immediately following the episodes. On appeal, we concluded that her testimony was inadmissible hearsay within our Supreme Court's holding in People v LaLone, 432 Mich 103; 437 NW2d 611 (1989). In addition, an officer of the Kalkaska Sheriff's office testified regarding a statement defendant made in the police car after he had taken a polygraph examination. Defendant argued that this

statement was taken in violation of his Fifth Amendment rights. We concluded that the statement was not taken in violation of Miranda[1] or any other Fifth Amendment protections. See Anderson, supra at 3. We failed to consider whether the statement was taken in violation of his Sixth Amendment right to counsel.

After we affirmed defendant's conviction, he sought relief in our Supreme Court. In lieu of granting defendant's application for leave to appeal, the Court vacated that portion of our opinion addressing the admissibility of defendant's statement and remanded the matter to this court for reconsideration in light of People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56 (1984), aff'd sub nom Michigan v

Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). The Court further directed us to reevaluate the impact of the testimony of Barbara Cross, presumably under the assumption that defendant's statement was taken in violation of his Sixth Amendment right to counsel. We conclude that even if defendant's statement was taken in violation of his Sixth Amendment right to counsel, the evidence at trial was so overwhelming as to render any error harmless beyond a reasonable doubt. Accordingly, we affirm defendant's conviction.

In Bladel, supra, our Supreme Court stated as follows:

> The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence [sic]." However, this right to counsel attaches only at or after the initiation of adversary judicial proceed-

> ings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. The accused is entitled to counsel not only at trial, but at all "critical stages" of the prosecution, i.e., those stages "where counsel's absence might derogate from the accused's right to a fair trial." Regardless of whether the accused is in custody or subjected to formal interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. This right to counsel does not depend upon a request by the accused and courts indulge in every reasonable presumption against waiver. [Bladel, supra at 51-52. Citations omitted.]

In the instant case, defendant's Sixth Amendment right to counsel attached when he was arraigned on May 26, 1988, and defendant requested counsel at that time. Thus the only remaining questions are whether the period where defendant made the statement at issue could be considered a critical stage and, if so, whether defendant made a valid waiver of his Sixth Amendment right to counsel.

The circumstances under which defendant made the statement in issue convince us that the time period was a critical stage. A separate record was made where Detective Bruce Gaultier testified that on June 2, 1988, defendant took a polygraph examination in Gaylord. Defendant made the statement while on the return trip to Kalkaska where he was incarcerated. Gaultier admitted that he did not personally read defendant his Miranda rights in the car, although he believed that they were read in connection with the polygraph examination about one hour earlier. The prosecution did not call the state police officer who allegedly gave defendant his rights prior to the polygraph examination.

Gaultier testified that he and defendant were in the car on the way

back from the polygraph when he engaged defendant in a conversation regarding the offense with which defendant was charged. Detective Gaultier admitted that he was questioning defendant. Gaultier told defendant that he felt defendant was being untruthful, whereupon defendant admitted that he had sexual thoughts about his daughter, but as he became aware of them, he put them out of his mind. This statement was related to the jury during the prosecution's case-in-chief. Under the circumstances, we believe that the detective's questioning of defendant while he was transporting him from a polygraph examination was a critical stage in which defendant was entitled to counsel as guaranteed by the Sixth Amendment, or at least the opportunity to waive that right. See

Brewer v Williams, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977).

In Bladel, our Supreme Court directed courts to indulge every presumption against waiver of a defendant's Sixth Amendment right to counsel. Bladel, supra at 52. Upon examination of the record, we conclude that there is insufficient evidence to determine conclusively whether defendant waived his Sixth Amendment right to counsel prior to giving the statement at issue. Due to the inadequate development of the record, we presume that defendant did not waive his Sixth Amendment rights and therefore the statement at issue was taken in violation of those rights. Notwithstanding our presumption that the statement was taken in violation of defendant's Sixth Amendment right to

counsel, we hold that the error was harmless beyond reasonable doubt.

In evaluating error to determine whether it is harmless, a two-tiered analysis is applied. We must first determine whether the error is so offensive to the maintenance of a sound judicial system that it may never be considered harmless. People v Neal, 182 Mich App 368, 373; 451 NW2d 639 (1990) (quoting People v Furman, 158 Mich App 302, 317-318; 404 NW2d 246 [1987], lv den 429 Mich 851 [1987]). Next, we must determine whether the error was harmless beyond a reasonable doubt so that no reasonable juror would have acquitted the defendant in a trial without the error. Id.

In Neal, this Court determined that the trial court erred when it denied the

defendant's request that the court hold a hearing pursuant to People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965), to evaluate the voluntariness of certain statements made by the defendant. Nonetheless, this Court determined that the failure to hold the hearing was harmless because the introduction of the statement "did not constitute such an affront to the integrity of the trial process that reversal [was] required." Neal, supra at 373. In addition, the Court found that the evidence introduced was so overwhelming that all reasonable jurors would find guilt beyond a reasonable doubt even without the improperly admitted statements. Id. at 373-374. The Court therefore declined to remand for a Walker hearing.

In the case at bar, we conclude that the error was neither so severe as to be a threat to the maintenance of a sound judicial system, nor was it of the type that would influence a reasonable juror's decision to convict defendant of the offense charged. The victim in this case testified extensively and in graphic detail regarding the incidents of sexual misconduct that defendant committed. After conducting his investigation of the allegations, Detective Gaultier was able to corroborate the victim's testimony almost to the letter. We note that even without the testimony of Barbara Cross, whose statements we have previously found to be inadmissible, and the statement made to Detective Gaultier by defendant, any reasonable juror would have convicted

defendant on the crime charged. Accordingly, we conclude that neither a remand for expansion of the record, nor reversal is warranted in this case.

We do not take lightly the apparent violation of defendant's Sixth Amendment right to counsel. However, we simply cannot conclude that the error is a serious threat to the maintenance of a sound judicial system or to defendant's right to have a fair trial.

Affirmed. We do not retain jurisdiction.

s/Martin M. Doctoroff
s/Thomas J. Brennan

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[1] Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 644 (1966).

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v No. 152135

JAMES KING ANDERSON, III,

Defendant-Appellant.

---/

Before: Doctoroff, C.J., and Brennan and Cavanagh, JJ.

CAVANAGH, J. (dissenting).

I respectfully dissent. After a careful review of the record, I cannot agree with the majority's conclusion that the victim testified "extensively and in graphic detail" or that the evidence of guilt was so overwhelming any error would have been harmless.

I found the victim's testimony very limited and possibly influenced by the sexual abuse she had suffered at the

hands of her stepbrothers or by the fact that her father was contemplating a change in her custody. I am also troubled by Detective Gaultier's corroboration of the victim's allegations and cannot help but feel that all of the errors in this case prevented the defendant from receiving a fair trial.

I would reverse defendant's conviction.

/s/Mark J. Cavanagh

Michigan Supreme Court
ORDER Lansing, Michigan

Entered: May 8, 1992

92407

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, SC: 92407
v COA: 120714
LC: 88-000905-FC
JAMES KING ANDERSON, III,

Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal is considered, and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we VACATE, in part, the judgment of the Court of Appeals and we REMAND the case to that court. On remand, the Court of Appeals shall reconsider the question of the admissibility of the defendant's post-arraignment statement in light of this Court's decision in People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56

(1984), aff'd sub nom 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). Thereafter, that court shall also determine whether any error in the admission of that statement and the error in admitting the hearsay testimony of the social worker may be deemed harmless. In all other respects, leave to appeal is DENIED.

We do not retain jurisdiction.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 8, 1992 /s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN, September 9, 1991

Plaintiff-Appellee,

v No. 120714

JAMES KING ANDERSON, III,

Defendant-Appellant.

---/

Before: Doctoroff, P.J., and Maher and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted of first degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced to 50 to 75 years imprisonment. Defendant appeal as of right claiming that the trial court erred in its treatment and determination of the victim's competency to testify, in admitting testimony, and in instructing the jury. Defendant also claims prose-

cutorial misconduct denied him a fair trial. We affirm.

The victim in this case was defendant's daughter, who was nine years old at the time of trial. Defendant's first claim on appeal is that the trial court erred in administering the oath to the victim outside the presence of the jury, by improperly bolstering the child witness' credibility and by failing to give the child witness instruction. Defendant did not object to the procedure used and statement made by the trial court regarding the child witness' testimony. When issues are raised for the first time on appeal, or when a defendant fails to object at trial, this Court will grant review only if failure to do so would result in a miscarriage of justice. Petrus v Dickinson Co Board

of Comm'rs, 184 Mich App 282, 288; 457 NW2d 359 (1990); People v Seabrooks, 135 Mich App 442, 454; 354 NW2d 374 (1984). Further, the failure of a trial court to give a cautionary instruction will not be reviewed where no objection or request was made at trial unless this Court determines that justice requires review. People v Edwards, 35 Mich App 233, 235; 192 NW2d 382 (1971), lv den 388 Mich 784 (1972).

No miscarriage of justice will result from our failure to review this issue. Defendant's claim that the trial court erred by administering the oath to the witness outside the presence of the jury is without merit. Neither MCL 600.2163; MSA 27A.2163, nor MRE 603, require administration of the oath in the jury's presence. The trial court

instructed the jury regarding its duty to determine the credibility of witnesses and the weight to be given to testimony. The use of CJI 5:2:09 is no longer recommended and it has been deleted from the approved jury instructions. See CJI 2d 5.9. The trial court's statement that it was satisfied that the victim understood her obligations as a witness was not error.

Defendant's second claim is that the trial court erred in allowing a psychiatric social worker to testify as to the victim's hearsay statements under the medical treatment exception. MCR 803(4).

Hearsay is not admissible. MRE 802. MRE 803(4) provides an exception to the general rule of inadmissibility for "[s]tatements made for purposes of medi-

cal treatment or medical diagnosis in connection with treatment. . ."

In People v LaLone, 432 Mich 103, 437 NW2d 611 (1989), our Supreme Court held that statements of the identity of the perpetrator made to a psychologist during an examination following allegations of sexual abuse were not admissible under MRE 803(4). The Court reasoned that statements to psychologists are inherently less reliable than those made to physicians and that the hearsay statements identifying the perpetrator did not fall within the literal or intended purpose of MRE 803(4).

This case is distinguishable from LaLone on two grounds. First, the complainant in LaLone was defendant's fourteen-year-old stepdaughter. Com-

plainant here, defendant's natural daughter, was eight years old at the time the statements were made. Second, the statements in LaLone were made after the accusations had been made and a police investigation had begun. Here, the statements initiated the investigation. In addition, the statements were made during the psychiatric social worker's treatment of the child due to prior sexual assault of complainant by her stepbrothers. The circumstances surrounding the complainant's statements in this case support a finding that those statements are more reliable than the statements in LaLone. However, we are bound by the Supreme Court's decision to find that the hearsay testimony of the social worker was improperly admitted. Nevertheless, after review of

the record, we conclude that erroneous admission of this testimony was harmless. The testimony was cumulative to the child's in-court testimony. MCL 769.26; MSA 28.1096, MCR 2.613(A). See also People v Meeboer, 181 Mich App 365, 372-373; 449 NW2d 124 (1989), lv gtd 436 Mich 879 (1990).

Defendant's third claim is that the trial court erred by admitting testimony of other instances of sexual activity between complainant and defendant. Defendant did not object to the challenged testimony at trial. Hence, appellate review is waived absent manifest injustice. People v Norman, 184 Mich App 255, 258; 457 NW2d 136 (1990), lv den 437 Mich 971 (1991). Manifest injustice will not result. The evidence of prior sexual activity between defen-

dant and complainant was admissible under People v DerMartzex, 390 Mich 410; 213 NW2d 97 (1973). We reject defendant's argument that the DerMartzex rule did not survive adoption of the Michigan Rules of Evidence. People v Dreyer, 177 Mich App 735; 442 NW2d 764 (1989), lv den 434 Mich 865 (1990).

Defendant's fourth claim is that prosecutorial misconduct denied him a fair trial. Specifically, defendant argues that various comments made by the prosecutor tended to shift the burden of proof, bolster the credibility of the victim, appeal to the sympathy of the jury, represent the prosecutor's personal beliefs, and denigrate the truthfulness of both defendant and his counsel.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. People v Foster, 175 Mich App 311, 317; 437 NW2d 395 (1989). Questions involving prosecutorial misconduct are decided on a case-by-case basis and this Court must evaluate each question within the context of the particular facts of the case. People v Burnett, 166 Mich App 741, 754; 421 NW2d 278 (1988), lv den 431 Mich 900 (1988).

Defendant did not object to the majority of the more than twenty-five prosecutorial statements complained of on appeal. Review of the unobjected-to statements is precluded unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction and failure to con-

sider this issue would result in a miscarriage of justice. Foster, supra. Having considered each of defendant's claims, we find that failure to review these alleged instances of misconduct will not result in a miscarriage of justice.

We now turn to the statements to which defendant objected. First, defendant argues that various comments by the prosecutor vouched for the credibility of the complainant. During the prosecutor's questioning of complainant, defendant objected on grounds that the prosecutor was seeking to impeach his own witness. The prosecutor replied that he was entitled to do that and "to boost her credibility by explaining the truth." The jury was excused and discussion was held in chambers. On the

record, the trial court stated only that the prosecutor was not going to proceed with the line of questioning. The prosecutor's statement did not bolster the credibility of the complainant and did not deny defendant a fair trial.

Defendant also objected to the prosecutor's statement during cross-examination of defendant that the prosecutor is a parent. After objection, the prosecutor reformulated his question. Although the statement placed irrelevant personal information about the prosecutor in front of the jury, we do not believe that the statement was so prejudicial that defendant was denied a fair trial.

Next, defendant claims that the prosecutor vouched for the credibility of

complainant by stating that complainant had repeated the allegations of abuse to the prosecutor half a dozen times. Defendant's objection this statement was sustained and the jury instructed to disregard the comment. Again, we do not believe the comment denied defendant a fair trial.

Second, defendant argues that the prosecutor improperly appealed to the jury's concern about social problems by referring to the National Enquirer. Defendant's objection was overruled and the prosecutor was cautioned. The context in which the statement was made concerned the fact that people read and hear all kinds of shocking stories and do not want to believe that such things happen. The prosecutor urged the jury to believe that sexual abuse of the com-

plainant had occurred. We reject defendant's claim that this statement improperly appealed to the jury's concern about social problems.

Finally, we reject defendant's claim that he was denied a fair trial due to the cumulative effect of the prosecutor's misconduct. While some of the comments present a close call, we are not convinced that, on the record as a whole, defendant was denied a fair trial. We do, however, caution the prosecutor to refrain from placing personal information before the jury, to confine his comments to the evidence presented and reasonable inferences arising from it, and to refrain from comments that can be interpreted as vouching for the credibility of his witnesses.

Defendant's fifth claim is that the trial court erred in admitting a statement made by defendant to Detective Gaultier. Defendant contends that the statement should have been excluded because defendant's attorney was not present when defendant was questioned and that defendant did not waive his right to counsel before speaking to the detective.

The statement was made while the detective drove defendant from Gaylord to Kalkaska following a polygraph examination which had been performed at defendant's request. There is no allegation that defendant sought counsel's presence during the questioning. The testimony is unrefuted that defendant was read his Miranda [Miranda v Arizona, 384 US 436; 86 S Ct 1602; 76 L Ed 2d 644

(1966)] rights and waived those rights prior to the polygraph examination. The Miranda rights were given and waived one hour before defendant made the statement at issue. The failure to reread Miranda rights prior to each interrogation does not render a defendant's subsequent statements inadmissible. People v Ray, 431 Mich 260; 430 NW2d 626 (1988); People v Godboldo, 158 Mich App 603; 405 NW2d 114 (1986). Having reviewed the record, we conclude that the decision to admit the statement was not clearly erroneous. People v Williams, 171 Mich App 234, 237; 429 NW2d 649 (1988).

Defendant's final claim is that the trial court erred in instructing the jury it could convict defendant by finding that either one of the alleged acts of penetration occurred. Defendant did

not object to the instruction at trial. Failure to object to jury instructions waives appellate review absent manifest injustice. People v Johnson, 187 Mich App 621, 628; ___ NW2d ___ (1991). Manifest injustice will not result here as there was no error. The trial court instructed the jury in accordance with CJI 20:2:01. That instruction allows the jury to find defendant guilty if it finds penetration into the complainant's anal or genital openings. There is no requirement that the jury unanimously agree on the location of the penetration. See Johnson, supra, pp 629-630.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Richard M. Maher

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 120714

JAMES KING ANDERSON, III,

Defendant-Appellant.

---/

Before: Doctoroff, P.J., and Maher and Cavanagh, JJ.

CAVANAGH, J. (concurring)

Although I do not join in the majority's attempt to distinguish this case from People v LaLone, 432 Mich 103; 437 NW2d 611 (1989), I do agree that the testimony of the psychiatric social worker was improperly admitted, and would affirm for the sole reason that the testimony was cumulative to the victim's in-court testimony and was therefore harmless.

/s/ Mark J. Cavanagh

ORIGINAL

Supreme Court, U.S.
FILED
JAN 20 1995
OFFICE OF THE CLERK

No. 94-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-v-

JAMES KING ANDERSON III

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: RONALD J. BRETZ (P26532)
Assistant Defender
340 Business & Trade Center
200 Washington Square, North
Lansing, MJ 48913
(517) 334-6069

Counsel for Respondent

No. 94-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-v-

JAMES KING ANDERSON III

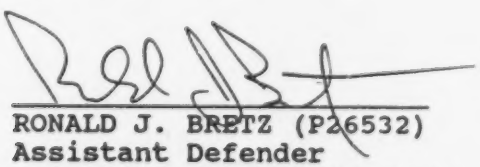
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, JAMES KING ANDERSON III, who is now held in the Kinross Correctional Facility, asks leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari to the Supreme Court of the State of Michigan without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The respondent's affidavit in support of this motion is attached hereto. Respondent has been represented by appointed counsel for all post-conviction proceedings. See attached Order.

STATE APPELLATE DEFENDER OFFICE



BY: RONALD J. BRETZ (P26532)
Assistant Defender
340 Business & Trade Center
200 Washington Square, North
Lansing, MI 48913
(517) 334-6069

Counsel for Respondent

NO. 94-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1994

State of Michigan,

Petitioner,

v

James King Anderson III,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED

IN FORMA PAUPERIS

I, James King Anderson III, being duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and,

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ____ No ✓

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of you employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Jerry Long $ 600.00

2. Have you received within the past twelve months any income from any of the following sources?

a. Business, profession or form of self-employment?

Yes ____ No ✓

b. Rent payments, interest or dividends?

Yes ____ No ✓

c. Pensions, annuities or life insurance payments?

Yes ____ No ✓

d. Gifts or inheritances?

Yes ____ No ✓

e. Any other sources?

Yes ____ No ✓

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

Yes ____ No ✓ (Include any funds in prison accounts.)

If the answer is yes, state the total value of the items owned.

4.78

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ____ No ✓

If the answer if yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

NONE

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.

James K Anderson

James King Anderson III

SUBSCRIBED AND SWORN TO before me, this ____ day of _____, 1994

_____

Notary Public, _____ County, Michigan
My Commission Expires:

Subscribed and sworn before me, this ____ day of DEC 15 1994 a Notary Public in and for CHIPPEWA County Michigan.

James S Thornton

(Signature)
NOTARY PUBLIC

My Commission expires _____, 19__

JAMES S. THORNTON
NOTARY PUBLIC - CHIPPEWA COUNTY, MICH.
MY COMMISSION EXPIRES 06-03-96

JAMES S. THORNTON III NOTARY PUBLIC CHIPPEWA COUNTY

Approved, SCAO

Copies to: Trial Court, Court Reporter(s)/Recorder(s), Assigned Counsel, Defendant, Prosecutor, Court of Appeals, and MAACS

STATE OF MICHIGAN 46th JUDICIAL CIRCUIT KALKASKA COUNTY	ORDER REGARDING APPOINTMENT OF APPELLATE COUNSEL ~~AND TRANSCRIPT~~ ☒ Substitution of Counsel ☐ Order amended	CASE NO. 88-905 FC

Court address: P. O. Box 10, Kalkaska, MI 49646

Court telephone no.: 616/258-3300

People of THE STATE OF MICHIGAN

v

Defendant name, address, date of birth, and inmate no. (if known)
ANDERSON, JAMES KING, P200209
Kinross Correctional Facility
P. O. Box 171
Kincheloe, MI 49788 DOB: 10/22/57

OFFENSE NAME	MCL CITATION	SENTENCE(S)
CSC 1st	750.520B1A	50-75 years

1. On November 7, 1994 (Date) the defendant filed a request for appointment of counsel ~~and a declaration of indigency~~.

IT IS ORDERED:

☐ 2. Defendant's request for appellate counsel is denied because the ☐ request is untimely. ☐ defendant is not indigent.

☐ 3. ☒ The State Appellate Defender Office, Suite 3300 Penobscot Building, 645 Griswold, Detroit, MI 48226 (313) 256-9833

OR

☐ _____ (Name of Appellate Counsel) _____ (Address)

RECEIVED
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STATE APPELLATE DEFENDER OFFICE

_____ (City, state, and zip) _____ (Telephone no.) _____ (Bar no.)

is appointed counsel for the defendant in post-conviction proceedings. If appointed counsel cannot or will not accept this appointment, counsel shall notify the court immediately.

4. The court reporter(s)/recorder(s) shall file with the trial court clerk the transcripts checked below and any other transcripts requested by counsel in this case not previously transcribed. Transcripts shall be filed within 28 days for pleas or 56 days for trials from the date ordered or requested. [MCR 7.210(B)] Reporter(s)/recorder(s) shall be paid as provided by law.

TRANSCRIPT ORDERED	REPORTER/RECORDER NAME, DESIGNATION, AND NUMBER		DATE(S) OF PROCEEDING
☐ a. Jury trial ☐ b. Bench trial ☐ c. Plea			
☐ Probation Violation ☐ d. Plea ☐ e. Hearing			
☐ f. Sentence ☐ g. Resentence			
☐ h. Other (specify)			

5. The clerk shall immediately send to counsel a copy of the docket entries and the transcripts ordered above or requested by counsel as they become available. The clerk shall also forward documents upon request by counsel. [MCR 6.433]

11/28/94 (Date)

X _____ Judge Alton T. Davis P24472 (Bar no.)

CERTIFICATE OF MAILING

☒ I certify that on this date I mailed a copy of this order appointing counsel on appointed counsel, defendant, court reporter(s)/recorder(s), prosecutor, Court of Appeals, and the Michigan Appellate Assigned Counsel System. I also mailed a copy of the defendant's request for appointment of counsel to appointed counsel, the prosecutor, and the Michigan Appellate Assigned Counsel System.

☐ I certify that on this date I mailed a copy of this order denying appointment of counsel on defendant, prosecutor, and the Michigan Appellate Assigned Counsel System. I also mailed a copy of the defendant's request for appointment of counsel to the prosecutor and the Michigan Appellate Assigned Counsel System.

11/30/94 (Date)

Phyllis Pyke (Signature)

No. 94-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-v-

JAMES KING ANDERSON III

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
TO THE MICHIGAN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

BY: RONALD J. BRETZ (P26532)
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200 Washington Square, North
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Counsel for Respondent

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS COURT DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED BY POST-ARRAIGNMENT, POLICE-INITIATED INTERROGATION EVEN THOUGH RESPONDENT WAS NOT IN CUSTODY AT THE TIME?

II. SHOULD THIS COURT DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT THE POLICE INITIATED INTERROGATION WITHIN THE MEANING OF MICHIGAN V JACKSON, SUPRA?

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II. THIS COURT SHOULD DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT THE POLICE INITIATED INTERROGATION WITHIN THE MEANING OF MICHIGAN V JACKSON, SUPRA. 6

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Anderson, James King III

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COUNTERSTATEMENT OF THE CASE

Respondent accepts Petitioner's statement with the exception of the following:

At the remand hearing ordered by the Michigan Supreme Court in this case, Detective Gaultier did not testify as to the exact date he contacted Respondent concerning the availability of a polygraph exam. Although the trial court found that this contact was made prior to Respondent's arraignment, there is no testimony to support this finding. (Remand Transcript 44-45, Respondent's Appendix, 44a-45a). The Michigan Supreme Court found that Detective Gaultier contacted Respondent after arraignment. (Petitioner's Appendix 17a)

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED BY POST-ARRAIGNMENT, POLICE-INITIATED INTERROGATION EVEN THOUGH RESPONDENT WAS NOT IN CUSTODY AT THE TIME.

Petitioner correctly notes this Court's holding in Michigan v Jackson, 475 US 625, 636; 106 SCt 1404; 89 LEd2d 631 (1986), that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of defendant's right to counsel for that police-initiated interrogation is invalid." Petitioner then argues that this ruling, based on the Sixth Amendment, does not apply if the defendant is not in custody or if there has been a

break in custody between the arraignment and the subsequent interrogation. Petitioner's argument is incorrect; it is contrary to all of the prior Sixth Amendment decisions of this Court and it misperceives the protection afforded by the Sixth Amendment right to counsel.

All of the caselaw relied on by Petitioner to support his custody argument is based upon the Fifth Amendment. There is no question that the right to counsel created by this Court in Miranda v Arizona, 384 US 436; 86 SCt 1602; 16 LEd2d 694 (1966), applies only to a suspect who has not yet been charged with a crime and who is subjected to custodial, police interrogation. Accordingly, the Fifth Amendment decisions relied on by Petitioner also require that under Edwards v Arizona, 451 US 477; 101 SCt 1880; 68 LEd2d 378 (1981), a suspect who has advised the police that he wishes to consult with an attorney, cannot be subjected to further police-initiated interrogation as long as he remains in custody. See McNeil v Wisconsin, 501 US 171, 177; 111 SCt 2204; 115 LEd2d 158 (1991).

"Custody . . . is not controlling" in the Sixth Amendment context. Rhode Island v Innis, 446 US 291, 300, fn. 4; 100 SCt 1682; 64 LEd 2d 297 (1980). As this Court has stated, after the initiation of formal charges, the Sixth Amendment guarantees the accused "the right to rely on counsel as a 'medium' between him and the State." Maine v Moulton, 474 US 159, 176; 106 SCt 477; 88 LEd2d 481 (1985). This is because the Sixth Amendment right to counsel is more pervasive than the narrower Fifth Amendment

right created by the Miranda decision. Thus, even in the limited context of police questioning, the Sixth Amendment provides greater protection for an *accused* than the Fifth Amendment does for a *suspect*. For example, while the Fifth Amendment only provides a right to counsel when there is custodial police interrogation, the Sixth Amendment right to counsel applies whenever the State deliberately elicits inculpatory statements even when the accused is not in custody. Maine v Moulton, supra; Massiah v United States, 377 US 201, 206; 84 SCt 1199; 12 LEd2d 246 (1964); Brewer v Williams, 430 US 387; 97 SCt 1232; 51 LEd2d 424 (1977).

This Court's language in rejecting the State's argument in Jackson is applicable to the position advanced by the State in the instant case: "The State's argument misapprehends the nature of the pretrial protection afforded by the Sixth Amendment." Michigan v Jackson, 475 US at 631. In holding that a defendant who had exercised his Sixth Amendment right at arraignment was entitled to "at least as much protection" from police-initiated interrogation as that provided by Edwards v Arizona under the Fifth Amendment, this Court explained as follows:

> "Indeed, after a formal accusation has been made-and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment-the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of the investigation. Thus, the surreptitious employment of a cellmate, * * *or the electronic surveillance of conversations with third parties, * * * may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation may have been permissible before arraignment or indictment. Far from undermining the Edwards

> rule, the difference between the legal basis for the rule applied in Edwards and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances." *Id.*, at 632 (citations and footnote omitted).

Petitioner concedes that "few jurisdictions have addressed the issue of continuous custody in the Sixth Amendment context." *Petition For Writ of Certiorari*, at 18. This is an overstatement. In fact, no court has ever held that the Sixth Amendment right to counsel under Jackson requires continuous custody. Indeed, while Petitioner cites a Kansas Supreme Court decision as an example of a case that "applied a 'break in custody' exception to a Jackson rule analysis" *Id.*, at 19, Petitioner's statement is inaccurate. In State v Norris, 244 Kan 326; 768 P2d 296 (Kan 1989), the defendant had been brought to the police station and questioned regarding a murder. He invoked his right to counsel and was released without being charged. The following day, he was arrested and, prior to arraignment, was again given his Miranda rights and questioned. The defendant confessed to the murder. The Court held that the defendant's Sixth Amendment right to counsel had not attached on the murder because he had not yet been formally charged. The Court then found the confession admissible because the earlier invocation of the Fifth Amendment right had terminated when he was released from custody.

The Kansas Supreme Court cited with approval the Tenth Circuit's decision in United States v Geittman, 733 F2d 1419 (CA 10, 1984). In that case, the Court held that a post-arraignment statement obtained from a defendant released on bond violated his

Sixth Amendment right to counsel but not his Fifth Amendment right that had been invoked when he was originally taken into custody.

Accordingly, this Court should reject the State's invitation to impose a continuous custody requirement on the Sixth Amendment right to counsel. As this Court has noted, the purpose of the Sixth Amendment differs greatly from the purpose behind invocation of the Fifth Amendment right to counsel. The latter evidences a suspect's desire to deal with the police only through counsel. The purpose of invoking the Sixth Amendment right is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified'." McNeil v Wisconsin, 501 US at 177-178. Respondent Anderson was entitled to the full protection of the Sixth Amendment when Detective Gaultier initiated the post-arraignment interrogation. That right was violated when Gaultier exploited the opportunity to confront Respondent in the absence of counsel. This Court should deny the writ.

II. THIS COURT SHOULD DENY CERTIORARI WHERE THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT THE POLICE INITIATED INTERROGATION WITHIN THE MEANING OF MICHIGAN V JACKSON, SUPRA.

Respondent concedes that there is a difference of opinion as to when Detective Gaultier initially contacted Respondent about taking a polygraph examination. The trial court found that Gaultier contacted Respondent on May 25, 1988, the day *before* arraignment. (Petitioner's Appendix, 35a). The Michigan Supreme Court found that Gaultier contacted Respondent concerning the polygraph *after* arraignment and, therefore, after the appointment of counsel. People v Anderson (After Remand), 446 Mich 392, 401, 403-404; ___ NW2d ___ (1994). Petitioner, of course, relies on the trial court's finding and argues that Gaultier's contact with Respondent occurred prior to the attachment of the Sixth Amendment and, therefore, did not violate the bright-line rule of Michigan v Jackson.

The first problem with Petitioner's argument is that there is no testimony in the record as to exactly when Gaultier contacted Respondent. Gaultier testified at the remand hearing that it was on May 25, 1988, that he learned of the availability of a polygraph. However, he never said that his attempt to notify Respondent occurred the same day. Gaultier testified that he left a message at Respondent's house regarding the availability of a polygraph;

> "Q Okay. At what point did you find out that a polygraph would be available?
>
> A I believe it was on the 25th.

Q Two days later?

A Right.

Q And under what circumstances was that, then, communicated to Mr. Anderson?

A A message was left at the residence that he was staying at. I believe that was the Sue Rebone residence at that time.

Q And who left the message?

A I did, myself.

Q Did you speak directly with Mr. Anderson?

A No, I did not.

Q What type of message did you leave?

A I don't recall if -- if I left word with Sue Rebone, or if I left a handwritten message.

Q And what was, then, the content of the message?

A That -- I left him the date and time for the appointment for the polygraph examination, and, to contact me prior to that date and time, well in advance if he needed transportation to Gaylord.

Q And in response to that communication, did he, in fact, subsequently contact you?

A Yes.

Q When?

A I don't recall. It was prior to the scheduled polygraph appointment.

Q Do you know how much in advance of the scheduled polygraph, or how long after you had left the message?

A No, I do not." (Remand Transcript 44-45, Respondent's Appendix, 44a-45a).

Detective Gaultier was never asked when he contacted Respondent and he did not volunteer that information. Thus, there is

no basis in the record for the Petitioner's argument that the police initiation of communication with Respondent occurred before arraignment.

Moreover, even if Gaultier's contact was prior to arraignment, there is similarly no record of when Respondent responded to Gaultier's message. According to Gaultier's testimony quoted above, Respondent could also have contacted Gaultier prior to arraignment. If that was the case, the first post-arraignment contact would have been initiated by Gaultier when he went to Respondent's residence to drive him to the polygraph. If a bright line is drawn by the arraignment and attachment of the Sixth Amendment right to counsel, Gaultier crossed that bright line by seeking out Respondent to drive him to the post-arraignment polygraph. As the Michigan Supreme Court found, Gaultier's post-arraignment initiation of contact with Respondent, whether it was by leaving a message or picking him up for the trip to the polygrapher, was "...unquestionably in anticipation of further police interrogation, i.e., the polygraph examination and questioning thereafter." People v Anderson, 446 Mich at 404.

Despite the factual deficiencies in this record, it remains clear that Detective Gaultier initiated the post-arraignment, couselless interrogation that resulted in the admissions by Respondent. The initial conversations between Gaultier and Respondent concerned only the arrangements for the polygraph exam. As Petitioner correctly notes, such an exam is a matter of right under state law. Mich. Comp. Laws, §776.21(5). Even if

Respondent "initiated" contact with Gaultier by responding to Gaultier's message, that contact was limited to the polygraph arrangements. It certainly did not evidence an intent on Respondent's part to give up his previously invoked right to counsel. Even the waiver Respondent signed at the polygraph examination was, by its own terms, directed at the polygraph. (See Petitioner's Appendix at 53a-57a).

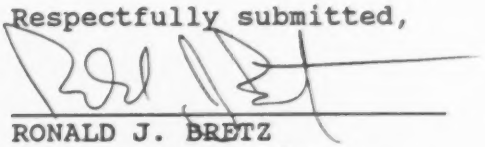
Detective Gaultier initiated interrogation during the drive home after the polygraph. According to the record, Gaultier began the conversation by telling Respondent that he wanted to speak with him regarding the charges. Gaultier then asked Respondent if he remembered the rights he had been given during the polygraph. Without again reading Respondent his rights, Gaultier began asking Respondent questions which resulted in the damaging admission.

This Court should recognize that even if Respondent initiated contact with Detective Gaultier for the purpose of arranging a ride to the polygraph, this contact was not an invitation to Gaultier to interrogate Respondent in the absence of counsel. Gaultier's clear initiation of post-arraignment interrogation violated the bright-line rule of Jackson v Michigan. For that reason, the decision of the Michigan Supreme Court is correct. This Court should deny the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari

Respectfully submitted,



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Counsel for Respondent

A P P E N D I X

STATE OF MICHIGAN

46TH JUDICIAL CIRCUIT COURT - KALKASKA COUNTY

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 95406
COA: 152135
LC: 88-905-FC

JAMES KING ANDERSON, III,

Defendant-Appellant.
_____/

EVIDENTIARY HEARING REGARDING SIXTH AMENDMENT RIGHT ON REHAND FROM THE SUPREME COURT

BEFORE THE HONORABLE ALTON T. DAVIS, CIRCUIT JUDGE

Grayling, Michigan - Thursday, May 12, 1994

APPEARANCES:

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Grayling, Michigan.

Thursday, May 12, 1994 - 1:42 p.m.

COURT OFFICER: All rise, please. 46th Circuit Court for the county of Kalkaska is now in session; the Honorable Alton T. Davis, presiding.

THE COURT: Thank you. You may be seated. Court is in session. This is the matter of the People of the State of Michigan versus James King Anderson. Mr. Hackley, do you want to put an appearance on the record?

MR. MACKLEY: Good afternoon, your Honor. Mark Mackley appearing on behalf of the People.

MS. DAGHER-MARGOSIAN: I'm Jeanice Dagher-Margosian, your Honor, for Mr. Anderson.

THE COURT: Thank you. This matter is here on a remand from the Supreme Court for purposes of an evidentiary hearing, limited in nature to the inquiries that the Supreme Court has placed before the Court. How would you like to proceed in the matter?

MS. DAGHER-MARGOSIAN: Well, your Honor, Mr. Mackley and I have discussed it, and I believe that he can open questioning and I can cross-examine that witness. That would appear to be logical since they mandated this, if that would be agreeable to the Court.

THE COURT: It's all right with me.

MR. MACKLEY: I assume, Judge, that I have the

burden, here, so I was prepared to initiate the questioning.

THE COURT: All right. Do you wish to proceed with a statement, or do you want to proceed with your witnesses?

MR. MACKLEY: No, Judge, I've got a couple of -- I've got four witnesses present. I don't know whether I will call them all, but I don't have a statement. I'm just going to go ahead and call the witnesses.

THE COURT: All right. Your first witness?

MR. MACKLEY: Thank you, Judge. The People would first call to the stand, Michael McMasters.

THE COURT: All right. Mr. McMasters, if you will please come before the Clerk, sir, and raise your right hand, she'll swear you as a witness.

COURT CLERK: You do solemnly swear or affirm that the testimony you shall give in this matter now pending, will be the truth, the whole truth, and nothing but the truth, so help you, God?

MR. McMASTERS: I do.

THE COURT: Thank you.

(Witness takes stand; examination not started)

THE COURT: May I see counsel at the bench before we start this?

(At 1:43 p.m., bench conference held on the record,

not recorded)

(At 1:44 p.m., bench conference concluded)

THE COURT: Given the circumstances and the nature of the remand and the issues before the Court today; after colloquy with counsel and I understand the agreement of counsel, the Court is going to order that any prospective witnesses remain outside the courtroom until they are called to testify. And, I further order that any witnesses not discuss their testimony with the other witnesses, either before or after they give the testimony. Once a witness -- once a witness has testified, they may remain in the courtroom if they have any interest in the proceedings. So, I would ask any witnesses now to -- that are not presently called, to await the call --

MR. MACKLEY: Would that include, Judge, the officer in charge of the case?

THE COURT: Yes, I think under these circumstances, it would have to.

MR. MACKLEY: Okay. Thank you.

(Prospective witnesses exit the courtroom)

MR. MACKLEY: Are you ok-- are you okay hearing me, Marlene?

COURT RECORDER: Pardon?

MR. MACKLEY: Are you okay hearing me?

COURT RECORDER: Yeah, you're fine.

THE COURT: Now, your name again, sir? I'm sorry.

THE WITNESS: Michael McMasters.

THE COURT: You may proceed.

MICHAEL McMASTERS

called on behalf of the People at 1:43 p.m., and sworn by the Clerk, testified:

BY MR. MACKLEY:

Q Could you, again, state your name for the record?

A Michael McMasters.

Q All right. Where are you employed, sir?

A I'm employed at McMasters Cost Company.

Q All right. Where were you employed in June of 1988?

A Michigan State Police.

Q In what capacity?

A I was a polygraph examiner.

Q All right. In what -- where were you located, or where were you stationed as a polygraph operator?

A In Gaylord, Michigan.

Q And as I understand it, you were employed by the Michigan State Police?

A That's correct.

Q At that time, sir, how long had you been a polygraph operator?

A Ten years.

Q Do you have -- have -- have you had some opportunity, or

-- to look at a file regarding a polygraph you administered on June 2nd, 1988, regarding a James King Anderson?

A Yes, I have.

Q And have you sufficiently refreshed your recollection as to that polygraph?

A I believe so.

Q All right. Do you -- what began your -- your process in --in doing this polygraph, sir?

A A polygraph was scheduled for that date for Mr. Anderson, and he was brought to the polygraph suite by Bruce Gaultier.

Q Do you recall what time they arrived?

A No, but I could refresh my memory.

Q Could you do that, please?

A This test was set for one o'clock, so they most likely would have got there at twelve forty-five.

Q What -- do you have an idea as to what time you first encountered Mr. Anderson?

A Yes.

Q And what time was that?

A 2:08 p.m.

Q And -- and in what context was that, sir? How -- how did that contact come about?

A He was brought to the examination room and sat down, and

we began our conversation about this case.

Q All right. And how did you begin your conversation about this case?

A Well, I got some personal history from him and -- which began at 2:08 p.m., concerning his health and well-being, his educational background, employment, a few other things. And then, at 2:10 p.m., I began reading what's known as the Miranda Warnings.

Q All right. Mr. McMasters, I'm handing you what's been marked as People's Proposes Exhibit Number One. Can you identify that for me, please?

A Yes, this is the form I used to advise Mr. Anderson of his rights.

(At 1:48 p.m., PX#1 identified for the record)

Q All right. That is a xerox or a duplicate copy of the original that is in your file --

A Yes, I --

Q -- Is it not?

A -- I have the original right here.

Q All right. And cou-- could you compare those forms and verify that that is a -- an accurate copy of the original that rests within that file?

(Witness compares PX#1 with form contained in file)

A It is.

Q And, what is the purpose of Proposed Exhibit Number One,

sir?

A This Rights form is used to advise what's known as the Miranda Warning; to tell the person that they have a right to remain silent, that they don't have to say anything, that anything they do say will be used against them in Court. He has a right to have an attorney and if he can't afford an attorney, one will be appointed for him. And then, he has to -- we have to be certain that he understood those rights. And, if he understands them, is he willing to waive those rights and talk to me about the case.

Q All right. Can you tell me specifically, Mr. McMasters, how that form is used? Is it read to him, or...

A It is read to him.

Q All right. Does he -- is he afforded the opportunity to read along with you?

A Yes. He has a copy in his hand while I read this particular form to him.

Q All right. Now, you read the form to him?

A Yes, I did.

Q Okay. And were you satisfied that he understood what you read to him?

A Yes, I was.

Q All right. And he informed you, did he not, that he had been appointed an attorney?

A Yes, he did.
Q And did he give you a name?
A Yes, he did.
Q And what name did he give you?
A Attorney Carey.
Q All right. What did you do after learning that he had an attorney?
A When he advised me that he had an attorney by the name of Mr. Carey, I told him that just because Mr. Carey wasn't present in the building with us, that didn't mean that he didn't have the right to talk to Mr. Carey. And, if at any time he decided that he needed to, or wanted to consult with Mr. Carey, we would stop and we would go to a phone and we would call Mr. Carey and he could counsel with Mr. Carey over the telephone. And, if we couldn't get a hold of Mr. Carey, we would stop the proceeding until he did get a hold of him and did have the opportunity to talk to Mr. Carey.
Q All right. Where did this -- where was this polygraph exsca-- examination scheduled to take place, sir?
A In Gaylord.
Q Is that where it took place?
A Yes.
Q And in -- and at what facility?
A 810 South Otsego, which is a combination Fire Marshall

office complex and polygraph.

Q When you had this conversation about Miranda rights with Mr. Anderson, was anyone else present in the room?

A No.

Q What happened after you had the conversation with Mr. Anderson about his rights to have access to an attorney?

A Well, he advised me that he understood all these rights and he advised me that he was willing to waive these rights and talk to me about the case.

Q Okay.

A And then he -- I had him sign the -- the form.

Q And if -- if I'm not mistaken, your signature also appears on that form.

A I signed it and he signed at 2:16 p.m.

Q All right. And my understanding is, 'my watch' on there means that you were looking at your own watch.

A My own watch.

Q And this is June 2nd, 1988.

A Right.

Q All right.

MR. MACKLEY: Your Honor, I would ask that People's Proposed Exhibit One be entered into evidence.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: I'm sorry. No objection, your Honor.

THE COURT: Thank you. That's admitted.

(At 1:52 p.m., PX#1 admitted without objection)

MR. MACKLEY: Thank you, your Honor.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q Can you tell us, sir, what ti-- what time -- or, what happened after you completed this form?

A Then, I asked him to tell me his side of the story concerning this case, and we began doing that.

Q Is that --

MS. DAGHER-MARGOSIAN: Your Honor --

MR. MACKLEY: -- what --

MS. DAGHER-MARGOSIAN: -- at this po-- excuse me, your Honor. I'm going to just an -- if we're -- I'm anticipating that we're going into the content of the polygraph and I think that's outside the scope of the remand from the Supreme Court. I don't think we really have to go any farther unless it has to do with the pre-test Advice of Rights. That's really all the Supreme Court remanded for.

THE COURT: Mr. Mackley.

MR. MACKLEY: I -- I'm simply trying to get a time frame, Judge. I'm going to ask just a few more questions about it and then I'll move on to something else.

THE COURT: I don't anticipate that there's any difficulty from the defense point of view with him

establishing a time frame. I think that the objection is probably well taken --

MR. MACKLEY: Can --

THE COURT: -- that we don't need to know about the content unless there's something during the course of the examination that would bear upon the rights, again, you see --

MR. MACKLEY: I'll --

THE COURT: -- but I don't know that.

MR. MACKLEY: In that respect, may we approach?

THE COURT: Yes.

(At 1:43 p.m., bench conference held on the record, not recorded)

(At 1:44 p.m., bench conference concluded)

THE COURT: I think we understand where we're headed here, now. I will sustain the objection for the record.

MR. MACKLEY: Thank you, Judge.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q Mr. McMasters, when you indicated that the Defendant started to tell you about his side of the case, was the polygraph machine running at that point?

A No.

Q All right. So, you had a preliminary conversation?

A That's correct.

Q Do you know what time that began and ended?

A I don't have it recorded on here. I -- I can tell you that we started the polygraph examination at 3:19 p.m.

Q And approximately how long did the polygraph examination last?

A We would have concluded at approximately 3:42 p.m.

Q All right. And in -- during the course of your examin-- your initial discussion with Mr. Anderson, did he at any time stop you and request to consult with His-- with Mr. Carey or any other attorney?

A No.

Q All right. And during the course of the polygraph, which began at approximately 3:19, and ended at 3:42; did Mr. Anderson stop you, at all, and request to consult with Mr. Carey or any other attorney?

A No.

MR. MACKLEY: That's all I have of this witness, Judge.

THE COURT: All right. Ms. Margosian.

CROSS-EXAMINATION

BY MS. DAGHER-MARGOSIAN:

Q Mr. McMasters, you've said that when the Defendant advised you that he had a lawyer, you then told him, "We can call your lawyer and you can talk to your lawyer before we continue." Is that correct?

A Yes; that he could stop and -- the proceedings until he

consulted with his attorney, whether it was by phone or whether he got a hold of him personally, or however we made the arrangements.

Q Okay. That was the extent of the rest of your discussion concerning his attorney. Is that correct?

A Yes.

Q Okay.

MS. DAGHER-MARGOSIAN: I have no more questions, your Honor.

THE COURT: Do you have anything further?

MR. MACKLEY: No, Judge.

EXAMINATION

BY THE COURT:

Q Was there any post-test interview with the Defendant? And, I'm not looking for the substance of the interview. What I'm looking for is: Was there any additional time that you spent with him before he was released?

A In this particular case, there would have been a few minutes that I would have advised him that in my opinion he was not being truthful to the issue and I would have given him an opportunity to tell me what the truth was.

Q Do you have a note or recollection as to the -- the time at which you terminated the procedures, all together, and he was released back to Deputy Gaultier?

A I have -- I don't have that noted here.

Q All right.

THE COURT: Did you have anything further?

MR. MACKLEY: No, Judge.

THE COURT: Did you have anything further?

MS. DAGHER-MARGOSIAN: Just one further question, your Honor.

RECROSS-EXAMINATION

BY MS. DAGHER-MARGOSIAN:

Q Mr. McMasters, when you found out that he had a lawyer, I'm understanding that you -- you certainly said, "We can call your lawyer, or stop at any time if you want to talk to your lawyer." Did you caution the Defendant at all, or affirmatively tell him of the dangers of proceeding without a lawyer, or did you go into it in any sort of affirmative way?

MR. MACKLEY: Judge --

THE WITNESS: No.

MR. MACKLEY: -- before he answers, I'm -- I'm going to object as to the relevance of whether he would have advised him as to any dangers. I don't know that he would have had a duty.

THE COURT: Well, that seems to be a sixty-four thousand dollar question, here, given these cases.

MS. DAGHER-MARGOSIAN: I'm just asking, your Honor, what Mr. McMasters did. I'm asking what happened, which

is, I think, exactly what we were remanded here to do.

THE COURT: I'll -- I'll -- I'll permit it. You can answer the question. Your answer was, "No.", I think.

THE WITNESS: That's correct.

THE COURT: All right. Anything else?

MS. DAGHER-HARGOSIAN: Nothing more, your Honor.

MR. MACKLEY: No, Judge.

THE COURT: Thank you. Is this witness released then, from --

MR. MACKLEY: As far as I'm concerned, Judge, he is.

THE COURT: Thank you, sir. Now, we don't have any original document from your file that you need?

THE WITNESS: No.

THE COURT: All right. Thank you, sir. You're --

THE WITNESS: All set?

THE COURT: -- You're free to go.

THE WITNESS: Thank you.

THE COURT: Yeah.

(At 2:00 p.m., witness excused)

THE COURT: Next witness?

MR. MACKLEY: May I have just a moment, Judge?

THE COURT: Sure.

MR. MACKLEY: Your Honor, the next wit-- the next witness that the People have is Staff Sergeant, Bruce Gaultier.

THE COURT: All right. Have you called him?

(Mr. Hackley retrieves Sergeant Gaultier from lobby)

THE COURT: If you would please come before the clerk, Sergeant Gaultier, and raise your right hand, sir, and she'll swear you as a witness.

COURT CLERK: You do solemnly swear or affirm that the testimony you shall give in this matter now pending, will be the truth, the whole truth, and nothing but the truth, so help you, God?

SERGEANT GAULTIER: I do.

THE COURT: Thank you, sir, and you may have a seat.

STAFF SERGEANT BRUCE GAULTIER

called on behalf of the People at 2:01 p.m., and sworn by the clerk, testified:

DIRECT EXAMINATION

BY MR. MACKLEY:

Q Would you state your name for the record, please?

A Bruce Gaultier.

Q Where are you employed, sir?

A The Kalkaska County Sheriff's Department.

Q In what capacity are you employed there, today?

A Staff Sergeant assigned to the Detective Bureau.

Q Was that your assignment, or rank, in June of 1988?

A Yes. Well, I was a Detective/Sergeant at that time.

Q All right. You are the officer in charge of the

investigation with the Kalkaska County Sheriff's Department with the case of the People versus James King Anderson?

A That's correct.

Q When did you first have occasion to begin investigating this case, sir?

A I believe it was on the 19th of May, 1988.

Q And how would that -- how would this incident have come to your attention, sir?

A It was a Department of Social Services referral from a Protective Services worker.

Q All right. Now skipping over a lot of what you did; did you ever have a chance to discuss your investigation with James King Anderson?

A Yes.

Q Do you recall the first time in which you did that?

A Yes.

Q And when was that, sir?

A It was May 23rd, 1988.

Q Do you have -- do you know what time of day that your discussion with Mr. Anderson took place?

A It was in the morning hours.

THE COURT: You said May 23rd?

THE WITNESS: Yes.

THE COURT: Thank you.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q And how was that contact made, sir?

A It was during an interview at the Sheriff's Department.

Q Did you arrange that interview?

A Yes.

Q Do you know when that interview began?

A Yes.

Q When did it begin?

A At approximately 9:45, in the morning.

Q And how long did the interview take you, total?

A I don't recall.

Q And what occurred during your discussion of these -- these incidents with Mr. Anderson? What happened first?

A Um --

(Assignment Clerk enters courtroom)

THE COURT: Hang on for a second.

(The Court and the Assignment Clerk confer at the bench)

THE COURT: Thank you. I'm sorry.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q Do you recall what the question was?

A I recall the question. I'm not sure I know the answer.

Q All right. What is the first thing you recall about the interview?

A I advised him of the allegations made by Peggy Beaver,

and found out some background information; confirmed that -- he indicated that he was her natural father, and some background inves-- information as far as how long they had lived together and where he lived now, and so forth.

Q Did the subject of a polygraph ever come up in that interview?

A Yes.

Q Can you tell the Court precisely how that subject arose in your conversation?

A Mr. Anderson brought the polygraph request up to me. He requested that he take one.

Q And what was your response to that, sir?

A Verbally or personally? Personally, I -- it had occurred rather early in the conversation, or the interview, and...

Q How did that effect the interview process?

A Well, it -- it destroys being able to proceed until the polygraph is given.

Q And -- and why is that?

A Well, when he indicates that he wants a polygraph, then he's indicating that he's willing to answer the charges that were made in a -- in a technique that's used quite frequently by law enforcement. By doing that, then, further interviews or continuing that interview is fruitless at that point.

Q All right. Now, that was your personal observation at the time the request was made?
A Yes.
Q What was your verbal response to Mr. Anderson?
A I told him that one could be set up and that -- he had indicated, also, at the time that he wanted to find out who was molesting Peggy and that by taking the polygraph that he could show that it wasn't him, and that he would find out who, in fact, had done that to her.
Q All right. Skipping to the date of the polygraph, sir, when was that set for?
A The polygraph was set for June 2nd.
Q And as I understand what happened, you made that arrangement?
A Yes.
Q With the State Police?
A Yes.
Q And that was at the request of Mr. Anderson?
A Yes.

THE COURT: When did you make that arrangement?

THE WITNESS: Specifically, I don't know what time I called them, but I was made aware of it -- that an appointment had been confirmed, and due to the proximity to the original request date, I believe it was a cancellation that had occurred.

THE COURT: Do you know the date upon which you requested it?

THE WITNESS: I received notice of it two days after the interview with Mr. Anderson. I requested it either on the 23rd, or the 24th.

THE COURT: Okay. You may proceed, Mr. Mackley.

MR. MACKLEY: Thank you, Judge.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q And as I understand it and -- I -- we should cover this before we move on; you arrested Mr. Anderson at the conclusion of your contact with him on the 23rd of May?

A Correct.

Q And he proceeded to be booked and all the normal things that go on?

A Correct.

Q All right. After that contact, when was the next time that you saw Mr. Anderson?

A On the second of June.

Q And that was for the purpose of the polygraph?

A Correct.

Q What happened on -- what was your first contact with Mr. Anderson on June 2nd?

A I had left a message that if he needed a ride that -- to get a hold of me early, and that I could drive him up there. And he did, in fact, need a ride and did contact

me at a prearranged time and we drove to Gaylord together.

Q All right. And you drove --

A Yes.

Q -- a Kalkaska County Police vehicle?

A Yes.

Q Do you recall anything as to what happened on the trip to --

A No, I don't.

Q -- the polygraph?

A No.

Q Do you recall, at all, what time you may have arrived?

A No, I don't. I know it was an afternoon appointment that we had.

Q What happened when you arrived at the site of the polygraph?

A First, I met with Mr. McMasters and he a-- he wanted to know background information about the case.

Q And you gave that to him?

A Correct.

Q Then, what happened?

A Then he took Mr. Anderson into the examination room.

Q And you were not present in that room.

A Correct.

Q Do you know approximately how long the polygraph took?

A Approximately two hours.
Q Do you know approximately what time you might have left -- well, let's go back a minute.
A What -- what was your first contact with Mr. Anderson after the polygraph was concluded?
A I met him in the -- again, in their waiting area and I escorted him out to the car so he could have a ride back to town.
Q All right. Did you have any conversation with Mr. McMaster after the polygraph?
A Yes.
Q Would that have been before or after you took Mr. Anderson to the car?
A Prior to.
Q So, Mi-- Mr. Anderson was there when you were speaking to Mr. McMaster?
A No.
Q Where was Mr. Anderson at the time you spoke with Mr. McMasters?
A I believe he was in the waiting area/common area at their -- in the foyer area of their building. It's not at the State Police Post. It's a private office that they had.
Q What happened in the conversation between you and Mr. McMasters after the polygraph?
A Specifically, --

MS. DAGHER-MARGOSIAN: Now, again, Judge, I'm -- I'm going to just renew my objection concerning getting into the substance of the polygraph, and I believe this would involve hearsay, as well, so I don't think any conversations as to the substance of the polygraph should come in here.

THE COURT: Mr. Mackley?

MR. MACKLEY: I wasn't asking for the substance of the polygraph. That's...

THE COURT: Okay. You were asking him about his conversation with McMasters?

MR. MACKLEY: Right.

THE COURT: Why?

MR. MACKLEY: To determine if he was aware of the result of the polygraph? And I -- I can just ask him that if...

THE COURT: As to that, Ms. Margosian?

MS. DAGHER-MARGOSIAN: As to that, your Honor, I don't -- I don't even see the -- the relevance of the outcome of the polygraph. I don't think it needs to be dealt with. It has nothing to do with the rights.

THE COURT: Mr. Mackley.

MR. MACKLEY: There is alleged a conversation on the way back. If the -- if the Detective is aware of a confession, they obviously don't need to have that

conversation, Judge.

THE COURT: I don't think that there's any question about the fact of the conversation. It took place. I don't understand. Are you -- are you trying to set the stage for the fact that there was a conversation, because we don't --

MR. MACKLEY: Yes. And, if you don't want us to go into --

THE COURT: It's in --

MR. MACKLEY: -- the conversation --

THE COURT: Well, it's in the record.

MR. MACKLEY: All right.

THE COURT: I mean --

MR. MACKLEY: That's fine.

THE COURT: -- it's in the record. They had a conversation. Is there any reason to know why --

MR. MACKLEY: No.

THE COURT: -- they had --

MR. MACKLEY: And, I'll --

THE COURT: -- the conversa--

MR. MACKLEY: -- withdraw the question --

THE COURT: Okay.

MR. MACKLEY: -- if that's --

THE COURT: Thank you.

MR. MACKLEY: -- what you're --

THE COURT: All right.

MR. MACKLEY: -- waiting for me to do.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q After the polygraph, you had a conversation with Mr. Anderson, however. Is that correct?

A Yes.

Q All right. Did his Miranda rights ever enter into the conversation that you had with him?

A Yes.

Q And can you tell the Court precisely in what context that conversation arose?

A When we got to the vehicle in the parking lot at the office for the -- where the polygraph had been administered, I advised Mr. Anderson that I wanted to talk to him on the way back and that -- and asked him if he recalled the rights that -- the constitutional rights that were given to him by the polygraph operator. He indicated that he did.

Q Was there any other discussion about that?

A I told him that -- that they were still in effect, but that I wanted to discuss with him why the outcome might have been what it was.

Q And then you left?

A He indicated to me that he understood those and he wanted to talk to me.

Q All right. And then you left?
A Correct.
Q Did you have any other conversation with Mr. Anderson regarding his Miranda rights --
A No.
Q -- after that time? All right.

MR. MACKLEY: That's all I have, Judge.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: Thank you, your Honor.

CROSS-EXAMINATION

BY MS. DAGHER-MARGOSIAN:

Q You are Detective Gaultier?
A Correct.
Q Detective Gaultier you -- when you were present at the polygraph -- I want the record to be clear. You are a county Sheriff in Kalkaska?
A Correct.
Q Okay. And this was given by a State trooper at the State Police post. Correct?
A It's a -- it's offices rented by the State Police.
Q Okay. It was State Police space by a State Police trooper?
A Yes.
Q Correct. Okay. Now, I want to back up to the -- to the first time that you -- when you spoke with the Defendant.

That was on May 19th, you said, and he came into your office at the Department, right?

A I think I said that I talked to the -- I became aware of this case on the 19th --

Q Okay.

A -- and I think I talked to him on the 23rd.

Q Okay; on the 23rd. Okay. He came to your office. Now at that time, there was an arrest warrant out, wasn't there?

A I think I picked him up downtown. He was walking downtown.

Q Okay. And there was an arrest warrant and you picked him up on that?

A Not initially. I asked him if he'd come to the Department for an interview.

Q But you were aware that there was an arrest warrant?

A Yes.

Q Okay. Before the interview, did -- did you discuss with Mr. Anderson, that there was an arrest warrant out --

A No.

Q -- for him?

A No, I --

Q No?

A -- did not.

Q Okay. And you say that you gave him standard Miranda

rights before the interview?

A No, I did not.

Q Okay; you did not give him standard Miranda rights before the interview. You gave him Miranda rights after the interview had concluded, and you placed him under arrest? Is that correct?

A No, I did not.

Q Okay. When did you give him the Miranda rights?

A I didn't give him his Miranda rights.

Q Okay. Even though you knew that there was a warrant for his arrest, you didn't bring him in and give him the Miranda rights. You brought him in and spoke with him further about the offense. Is that correct?

A (No verbal response)

Q You took him down to the station for an interview, instead of over to the Court for an arraignment?

A Correct.

Q Correct. Okay. And how long -- you said earlier that it was a brief interview. Do you remember just exactly how long it was, or what hours -- between what hours it took place?

A It was approximately an hour long.

Q Approximately an hour long. Okay. Now, at what point did you place Mr. Anderson under arrest?

A At the conclusion of the interview.

Q At the conclusion of the interview. Okay. And --

THE COURT: Let -- let me ask, Ms. Hargosian, just in the same sense that you've been interposing objections, what the value of all this is. There was nothing; as I recall the record and having looked at it since the case came back; from that interview that was permitted into the --

MS. DAGHER-HARGOSIAN: No, there --

THE COURT: -- draw.

MS. DAGHER-HARGOSIAN: -- wasn't, your Honor. That's right, because it wasn't permitted at the first trial. But, what -- what I'm interested in, is the communication of rights and an awareness that a Defendant may or may not have had, at that time, of the importance of counsel and the right to counsel. The actual statements weren't let in at trial, and I don't think they're relevant here.

THE COURT: Right.

MS. DAGHER-HARGOSIAN: But, I do think how the police were communicating with Mr. Anderson, vis-a-vis his right to counsel from the initial interrogation on, is very relevant because, in fact, it goes to their willingness and their awareness to communicate that. And, I'll obviously tie that in, in my argument, because of what I think their burden is.

THE COURT: Well, I'll let you ask the questions that you wish to ask, absent an objection from the People, but my understanding is that we're supposed to look very closely at some very narrow questions, which is whether or not he is the one that requested the polygraph. And if so, did he waive his Sixth Amendment right at the exam. And if he did waive it at the exam -- at the polygraph exam; not at this early interrogation; does it extend to the questioning in the car. Period.

But, you know, I will afford you whatever latitude you'd like. I just -- again, in the same spirit you raised your earlier objections, I want to keep the record to what apparently the Supreme Court is concerned about.

Did you have anything you wanted to say?

MR. MACKLEY: Judge, my understanding is, with respect to that interview; the only thing that's relevant here, is who initiated the request for the polygraph. That information's already been elicited and his Miranda rights at that time -- there are no statements that are at issue with respect to -- to that point.

THE COURT: Well, Ms. Margosian concedes that. I mean, the officer has testified that he didn't give him any Miranda rights, but -- go ahead, now, to the ex--

MS. DAGHER-MARGOSIAN: I think the importance though, Judge, is what a Defendant's perception is in

terms of right to counsel. We're not really talking about Miranda, here. We're talking about right to counsel. And, I think that when you take a citizen una-- unacquainted with the criminal justice system and bring him in. You don't tell him they're under arrest. You do a significant amount of questioning that goes toward the detriment of the client and you don't advise, not only of Miranda rights but of the specific right to counsel.

Had this officer taken him to Court and had him arraigned, he would have had counsel. Because that wasn't done, the Defendant may have perceived that he was at less peril. And I think that's very relevant to what the Supreme Court is looking for, here. We're looking at -- at the rights pre-arraignment, post-arraignment, pre-appointment, post-appointment. And, I think that police actions, by failing to take him in for arraignment, certainly go to the lack of advice of rights all the way through.

MR. MACKLEY: Judge, if I might respond. There was a statement about statements made -- or some questioning to the detriment of the Defendant. There's nothing -- there is nothing to the detriment of the Defendant that was ever brought out in the trial that took place out of that conversation.

THE COURT: Well, everybody agrees to that. And, I

don't think that the scope of the remand order extends to pre-arraignment activity.

MR. MACKLEY: I would certainly agree to that, Judge.

THE COURT: Well, I'm not surprised. Make your record, counsel, but that -- that's my position.

MS. DAGHER-MARGOSIAN: Okay.

THE COURT: All right.

MS. DAGHER-MARGOSIAN: Thank you, Judge. Just for the record, your Honor, I do think this bears very much --

THE COURT: All right.

MS. DAGHER-MARGOSIAN: -- on whether the Defendant initiated the request for polygraph, post-appointment of counsel, or pre-appointment of counsel. And, I think that all of this discussion between Detective Gaultier and the Defendant is very, very relevant to whether the Defendant was advised of the importance of counsel, and the right to counsel. It's a Sixth Amendment question, your Honor, and I do think it's relevant, but I'll refrain from those questions if that's your ruling.

THE COURT: Well, no. I -- I think I've made my position on the record. Now, I want you to be able to elicit the answers that you want so that we don't have to come back here, again.

MS. DAGHER-MARGOSIAN: Right.

THE COURT: I'm just telling you, when I get to ruling on this thing, I don't believe that I'm concerned with that. But, you go ahead.

MS. DAGHER-MARGOSIAN: All right.

THE COURT: All right.

MS. DAGHER-MARGOSIAN: Thank you, your Honor.

CROSS-EXAMINATION CONTINUED

BY MS. DAGHER-MARGOSIAN:

Q Okay. Detective Gaultier, before the -- before the polygraph, there was about a nine day period; from 5/23 to June 2, 1988. And, during that time, you say you made contact with Defendant. How did you do that in terms of arranging the polygraph?

A Left word, I believe, at his residence.

Q Okay. And did you get confirmation from him that he would show up for the polygraph?

A Yes.

Q Okay. And during the time -- between the time that you first talked to him and the polygraph date, he was arraigned in District Court. Correct?

A I believe so.

Q Okay. And -- and of course, you know that he was appointed counsel in District Court, at the arraignment.

A Yes.

Q Okay. Before the polygraph, did you ask the Prosecutor whether the Defendant had been appointed counsel?
A No.
Q No? And did you ask the Defendant whether he had been appointed counsel?
A No.
Q Okay. And, did you -- excuse me. When he arrived at your office for transportation to the polygraph, did you ask him whether he had consulted with counsel about the dangers of a polygraph?
A (No verbal response)
Q No?
A I don't believe so.
Q Or whether he had consulted, at all?
A I don't believe so.
Q Okay. Did you caution the Defendant, at all, before the ride to Gaylord, about possible dangers of a polygraph?
A No.
Q Okay. And you didn't talk to him, at all, about the fact that he maybe he should discuss this with his lawyer?
A No.
Q Okay. So moving on, to the polygraph itself. Once you were there, I believe we have testimony that you were in a different room watching it on closed circuit.
A Yes.

Q You did not administer Miranda warnings yourself, personally?

A Correct.

Q Okay. You were driving back to Kalkaska, from Gaylord, and it was sometime later; say between forty-five minutes to an hour; when you and the Defendant began to discuss sexual thoughts that the Defendant may have had about his daughter. Is that correct?

A Yes.

Q Yes.

THE COURT: Can I just clarify that. You -- you used a time frame, there, and that time frame is from what point? From the point they leave the police station, or --

MS. DAGHER-MARGOSIAN: Leaving the --

THE COURT: -- they've been on the road?

MS. DAGHER-MARGOSIAN: -- polygraph site, back to Kalkaska.

THE COURT: Within forty-five minutes to an hour of leaving the polygraph site?

MS. DAGHER-MARGOSIAN: Correct.

THE COURT: Okay. Thank you.

THE WITNESS: I believe it was sooner than that, then.

BY MS. MARGOSIAN, CONTINUING CROSS-EXAMINATION:

Q Sooner than that?
A Yes.
Q Sooner than an hour?
A Yes.
Q Okay. Did you, at the polygraph, discuss with Trooper McMaster that the Defendant had an -- had an attorney, or may have an attorney, or had been arraigned?
A No.
Q No. Okay. During the conversation in the car -- not before you got into the car, but after you got into the car and you're driving back and you're discussing thoughts and statements, as you testified to at trial; did you re-Mirandize him at any point?
A No.
Q Did you discuss his right to counsel at any point in the car?
A Well, I think that's a different question.
Q While driving?
A I believe that in the parking lot, in the car, is where we discussed --
Q In the car --
A -- his prior --
Q -- while --
A -- Miranda --
Q -- sitting still?

A Correct.
Q At that point.
A Correct.
Q So, after you left and you were on --
A Right.
Q -- the way back.
A No.
Q You did not advise him of any rights, further?
A Correct.
Q Okay.

MS. DAGHER-MARGOSIAN: Thank you. That's all I have, your Honor.

THE COURT: Mr. Hackley?

MR. HACKLEY: Just a couple of questions.

REDIRECT EXAMINATION

BY MR. HACKLEY:

Q The Kalkaska County Sheriff's Department doesn't have any polygraph equipment of it's own. Is that correct?
A Yes.
Q And, therefore, it's incumbent upon you to make arrangements with the Michigan State Police to use their personnel and their facilities. Is that correct?
A Yes.
Q Can you tell me mileage wise, how far away from the polygraph site you got when the conversation about the

Defendant's sexual thoughts about his daughter occurred?

A I -- I recall the stretch of roadway. I believe it's approximately fif-- ten to fifteen miles from Gaylord. It's on the cut off road to Mancelona. We were in the curves west of Old 27.

MR. MACKLEY: Thank you, Judge. That's all I have.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: I don't have anything further, your Honor.

EXAMINATION

BY THE COURT:

Q So how long would you estimate the time lapse between the time you spoke with him about his rights again, at the police car in the parking lot, and the time that he made the statement that was admitted at the trial?

A I'd estimate it to be fifteen minutes, or...

Q Fifteen minutes.

A Or maybe less.

Q I'm sorry?

A Possibly less than that.

Q And what, again, was your discussion with Mr. Anderson relative to his rights? With specificity.

A I advised him that I wanted to talk to him further about the incident and what circumstances may have caused the results he obtained from Mr. McMasters; and that being a

police officer and having been arrested, I had to clarify to him that he did not -- that he was not required to talk to me and referred to the statements made by Mike McMasters, when referring to the rights that he'd had given to him earlier. I asked him if he was familiar with those; asked him if he wanted to talk to me.

Q And what was his response to that?

A He indicated that he did.

Q Did he make any response as to his acknowledgment or knowledge of the rights that you were referring to?

A He -- yes, that -- that was -- he did recall that -- the conversation that he'd had with Mr. McMasters and those rights, and then also, he indicated that he did want to talk to me.

Q All right. But you did not specifically articulate each individual right. You simply referred to the rights that Trooper McMasters had informed him of, right?

A Correct.

Q All right. Now, the other thing that I wanted to -- to ask you about is, I'm assuming from what you've said, here, that at the time that you took Mr. Anderson up for the polygraph, that he was not incarcerated.

A Correct.

Q And that you were providing this transportation pursuant to the arrangements that you'd made when you first talked

with him on the 23rd, and the agreement for the polygraph had been arrived at, or the request had been made?

A He was -- he was furnished with the location that the polygraph test would be given, along with the date and time, and additional information that if he needed transportation to that location, that he could contact me well ahead of the appointment time, and he could seek transportation with me.

Q All right. Now, let me ask you about that. You say you talked to him on the 23rd, initially? That was the conversation -- the warrant was outstanding, but not served on him, and you have this conversation over at your office. Right?

A Right.

Q And it's on the 23rd, in the course of the conversation that he says, "I want to take a polygraph."

A Right.

Q And then you had to make arrangements for the polygraph.

A Correct.

Q And had you made the arrangements for the polygraph by the time you concluded your conversation with him on the 23rd?

A No, I had not.

Q Okay. And at what point did you find out when a polygraph would be available?

A I believe it was on the 25th.
Q Two days later?
A Right.
Q And under what circumstances was that, then, communicated to Mr. Anderson?
A A message was left at the residence that he was staying at. I believe that was the Sue Rebone residence at that time.
Q And who left the message?
A I did, myself.
Q Did you speak directly with Mr. Anderson?
A No, I did not.
Q What type of message did you leave?
A I don't recall if -- if I left word with Sue Rebone, or if I left a hand written message at the location.
Q And what was, then, the content of the message?
A That -- I left him the date and time for the appointment for the polygraph examination, and, to contact me prior to that date and time, well in advance if he needed transportation to Gaylord.
Q And in response to that communication, did he, in fact, subsequently contact you?
A Yes.
Q When?
A I don't recall. It was prior to the scheduled polygraph

appointment.

Q Do you know how much in advance of the scheduled polygraph, or how long after you had left the message?

A No, I do not.

Q No recollection?

A No.

Q Do you remember how it was he contacted you?

A No, sir.

Q You don't know if it was by phone, or in person, or otherwise?

A Correct.

Q All right.

THE COURT: Additional questions, Mr. Mackley?

MR. MACKLEY: No, Judge.

THE COURT: Ms. Margosian?

RECROSS-EXAMINATION

BY MS. MARGOSIAN:

Q Sergeant Gaultier, when you were in the car, did the Defendant indicate to you that he wanted to talk to you any further, or did you indicate to him that you wanted to continue talking to him?

A He indicated to me; in a response to my indication to him that I wanted to further the conversation; that he was willing to do so.

Q And, I just want to ask you about your testimony at

trial. In your testimony at trial, Sergeant Gaultier, you testified that he had been advised of his Miranda rights about an hour earlier that day. You stated that three times during this course of the testimony; that he had been advised by Mike McMasters during that polygraph, that it was about an hour before you were questioning him about the disputed statement. Would that change your testimony at all, here, today?

A Which part?

Q Well, that -- that it was a very short time from the end of the polygraph until the disputed statement was made in your car? Here it says, "...an hour...".

MR. MACKLEY: Judge, I'm going to object. I'm gonna -- if she's gonna impeach him with a statement, I think she has to show it to him.

MS. DAGHER-MARGOSIAN: I'm not sure that's true anymore, your Honor.

THE COURT: No, I don't believe it is.

THE WITNESS: I believe that the question we talked about earlier was the time after I had discussed the statement he made with Mike McMasters and the time that he made the statement.

BY MS. DAGHER-MARGOSIAN, CONTINUING RECROSS-EXAMINATION:

Q Okay. Well, then, maybe --

A I think --

Q -- we can --

A -- earlier today that was my understanding of --

Q Okay. Maybe we can clarify then, because I think there was some confusion. From the time of the end of the polygraph exam until you had the conversation with him in the car concerning sexual thoughts about his daughter; that was approximately an hour, correct?

A Correct.

Q Thank you.

MS. DAGHER-MARGOSIAN: I have nothing further, your Honor.

THE COURT: All right. May this witness step down, or do you have something further?

MR. MACKLEY: Just one question.

THE COURT: All right.

FURTHER REDIRECT EXAMINATION

BY MR. MACKLEY:

Q It could have been less than an hour, though. Is that correct? You said, "approximately".

A Yes.

MR. MACKLEY: That's all I had, Judge.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: Nothing further, your Honor.

THE COURT: You may step down, sir. Thank you.

(At 2:36 p.m., witness excused)

THE COURT: Your next witness?

MR. MACKLEY: Thank you, Judge. The People would next call Robert Carey, and I'll go get him.

THE COURT: You can remain, now, if you wish, or if you have other things, you may do those, too.

(Sergeant Gaultier remains and sits at counsel table)

THE COURT: Mr. Carey, if you'll please come before the Clerk and raise your right hand, sir, she'll swear you as a witness.

COURT CLERK: You do solemnly swear or affirm that the testimony you shall give in this matter now pending, will be the truth, the whole truth, and nothing but the truth, so help you, God?

MR. CAREY: Yes.

THE COURT: Thank you. You may have a seat, here.

MR. MACKLEY: Thank you, Judge.

ROBERT CAREY

called on behalf of the People at 2:36 p.m., and sworn by the Clerk, testified:

DIRECT EXAMINATION

BY MR. MACKLEY:

Q Would you state your name for the record, please?

A Bob Carey.

Q Where are you employed, sir?

A I'm an attorney.
Q Are you self-employed, as I understand?
A That's correct.
Q Where is your office?
A Kalkaska.
Q Did you, at one time, represent a James King Anderson, the Third?
A Yes, I did.
Q And do you recall how you were called upon to represent Mr. Anderson?
A I was appointed by the Court.
Q I hand you what's been marked as People's Proposed Exhibit Number Two, and ask if you can identify that for me, please.
A No. This isn't something that I normally see. This is in the Court file. That's what the Judge makes out on the bench when he -- at the arraignment. I wouldn't get a copy of this.
(At 2:37 p.m., PX#2 explained by the witness)
Q Did you -- you never got a copy?
A No.
Q All right. Have you ever seen a copy of that, before?
A No.
Q All right. Do you have a recollection as to when your first contact with the case was? Not necessarily Mr.

Anderson, himself, but the case.

A Yes. I have my file with me. If I may --

MR. MACKLEY: I have no objection, if the defense counsel doesn't object, Judge.

MS. DAGHER-MARGOSIAN: I have no objection, your Honor.

THE COURT: Thank you. You may look at your file.

(Mr. Carey reviews file at witness stand)

MR. MACKLEY: Can we approach, Judge, while he's --

THE COURT: Sure.

(At 2:39 p.m., bench conference held on the record, not recorded)

(At 2:39 p.m., bench conference concluded)

THE COURT: Thank you, Judge. For the purposes of this hearing, it's my understanding that counsel can stipulate that the date of arraignment in this matter was May 26th, of 1988, in front of the Honorable E. Patrick Murray. And, it's further stipulated that Mr. Carey was appointed by the Court at that time to represent Mr. Anderson.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: Oh, I'm sorry.

THE COURT: That is your agreement?

MS. DAGHER-MARGOSIAN: Yes, it is our agreement, your Honor.

THE COURT: Yes, the -- the full record before the Supreme Court reflects those documents in the District Court file and the Circuit file, so that -- that's a part of the record. Thank you. You may proceed.

MR. MACKLEY: Thank you, Judge.

BY MR. MACKLEY, CONTINUING DIRECT EXAMINATION:

Q When was your first contact with this case, Mr. Carey?

A I have a letter in my file dated June 1st, addressed to Mr. Anderson and indicating that I have been appointed as his attorney at that there's a pre-preliminary hearing conference scheduled for June 2nd.

Q And presumably, you would have had notice of your appointment prior to June 1st, or on June 1st?

A Yes.

Q And do you recall how that notification would have been received?

A It came to me in the form of a petition -- a copy of a petition and order for court appointed attorney.

Q And when is that dated?

A May 26th, 1988.

Q All right. And that's from the 87th District Court?

A That's correct.

Q Did you attend the pre-preliminary hearing?

A Yes, I did.

Q And who was -- who was involved in that?

A Michael Michalak, who was the Prosecutor, and myself, and that would have been on June the second.
Q Do you know at approximately what time that would have occurred?
A During the day?
Q Yes.
A I don't recall.
Q Do you --
A Probably the morning.
Q All right. Do you know what was discussed at that hearing?
A (No verbal response)
Q Let's put it this way; was there a polygraph discussed?
A No.
Q All right.
A Well -- let me -- let me retract. I don't recall.
Q All right. And you don't have any notes that reflect that a polygraph had been scheduled, or had taken place?
A Nothing in my files regarding a polygraph.
Q All right. What happened with respect to your involvement in this case after that meeting with the Prosecutor?
A In looking back over this, there was a long weekend in between. I filed my appearance; did the usual things; wrote a letter to Mr. Anderson asking him to contact me. He did schedule an appointment for June 6th, 1988, in my

office.

Q And did you meet with him on June 6th of 1988?

A Yes, I did.

Q In your office?

A Yes, I did.

Q All right. And did you begin to discuss the case with Mr. Anderson?

A I went through his personal background first, which is the normal way I do it. And then we started getting into the facts, and as soon as we got into the facts, I knew I was in a conflict of interest.

Q And the nature of that conflict was because you had represented someone in the Probate Court regarding a similar incident?

A Right.

Q All right. And subsequently --

A I was -- I was, in fact, representing somebody. That was a continuing matter in the Probate Court.

Q All right. In the Kalkaska County Probate Court?

A Yes.

Q And subsequently, you filed a motion to withdraw based on your discovery of that conflict?

A Yes, I did. I told Mr. Anderson right -- in fact, it's written in my notes that there is a conflict there -- that it was an inherent conflict, and I knew it was a

problem that could not be surmounted and that I would have to withdraw. And, I didn't take any further notes in the case.

Q And the order you submitted, withdrawing from the case, was entered on June 15th, as I -- as I understand it. Is that correct?

A On the 6th, I called Debbie Hale, who was the magistrate at the time. I advised her of the conflict, and advised her that we needed a new attorney to be --

THE COURT: You've got to --

THE WITNESS: -- appointed.

THE COURT: -- speak up a little bit, Mr. Carey.

THE WITNESS: Advised her that we needed a -- another attorney appointed. And, my notes indicate that on June 10th, I made a motion to withdraw, which was granted.

MR. MACKLEY: That's all I have, Judge.

THE COURT: Any questions, Ms. Margosian?

MS. DAGHER-MARGOSIAN: Just a couple, your Honor.

CROSS-EXAMINATION

BY MS. MARGOSIAN:

Q Mr. Carey, did anyone from the Police Department contact you concerning a polygraph?

A No.

Q Did anyone contact you to advise you that a polygraph for

Mr. Anderson had been scheduled?

A No.

Q Okay. Now, you say that you sent a letter to the Defendant. Do you have that letter in your file?

A Yes, I do.

Q In that letter, do you advise him not to talk with Police, or take polygraphs? Do you caution him as to those investigative things, at all --

A No.

Q -- in your letter?

A No. The letter strictly informs him of the appointment, the hearing date, and that is all.

Q Okay. Thank you. Did you do anything at all on this file until June 6th?

A Filed an appearance of counsel; demand for jury trial and evidence; met with the Prosecutor, as I said, and that is all.

Q Okay.

MS. DAGHER-MARGOSIAN: I have no other questions. Thank you.

EXAMINATION

BY THE COURT:

Q You say the pre-preliminary hearing was on 6/2?

A Yes, your Honor.

Q And your client wasn't present?

A No.
Q It was just a meeting with you and the Prosecutor?
A That's right.
Q It's not a meeting in court?
A No.
Q Okay.

THE COURT: Anything else, Mr. Hackley?

MR. HACKLEY: No, Judge.

THE COURT: Ms. Margosian?

MS. DAGHER-MARGOSIAN: Nothing, your Honor.

THE COURT: Thank you, sir. You're free to go.

MR. HACKLEY: May the witness be excused, Judge?

THE COURT: I'm sorry. Yes.

(At 2:46 p.m., witness excused)

THE COURT: Any other witnesses?

MR. HACKLEY: May we approach?

THE COURT: Yes.

(At 2:46 p.m., bench conference held on the record, not recorded)

(At 2:47 p.m., bench conference concluded)

THE COURT: I understand from counsel that there are no other witnesses to be presented in the case?

MR. HACKLEY: That's correct, Judge.

MS. DAGHER-MARGOSIAN: Yes.

MR. HACKLEY: I'll bring Mr. Kipley in and you can

release him.

THE COURT: All right.

MS. DAGHER-MARGOSIAN: That's correct, your Honor.

THE COURT: All right. Thank you. That being the case, I will release Mr. Kipley. And, then, I need to take a conference call and then we'll come back and hear the arguments of counsel.

(The Assignment Clerk enters the courtroom)

THE COURT: I'll be right there. Mr. Kipley, the lawyers have determined there's no need for your testimony, so I release you from any subpoena.

MR. KIPLEY: Okay. Thank you, Judge.

THE COURT: Thank you for your attendance, sir.

MR. KIPLEY: Thank you.

(At 2:48 p.m., Mr. Kipley released by the Court)

COURT OFFICER: All rise, please.

(At 2:48 p.m., Court in recess)

(At 3:19 p.m., court reconvened, all parties present)

COURT OFFICER: All rise, please.

THE COURT: Thank you. You may be seated. I'm sorry for that delay. Do you have anything by way of a closing argument, or statement, Mr. Hackley?

MR. MACKLEY: No, I don't, Judge. I believe we've fulfilled the requirements set forth in the order from

the Supreme Court dated March 25, 1994.

THE COURT: Okay. Ms. Margosian?

MS. DAGHER-MARGOSIAN: Your Honor, I -- I want to stress that I think that what this hearing is about, is whether the Defendant had right to counsel during the Police interrogation on this case. We had a bit of an exchange about whether it was relevant that Detective Gaultier was interrogating the Defendant prior to arrest.

What I think was very important about that was that it sets the tone for the rest of the interrogation that took place in this case. To say that it -- that it isn't relevant, may be technically true, but it's -- I believe it's blinding ourselves to the context and totality of the circumstances that took place here.

Now, what I also think is very important is that within that nine day period, there was an intervening event. And, the intervening event was that the Defendant was appointed counsel. From that point on, the slate was clean and initiations that took place after that time are relevant within the context of when counsel was given to the Defendant. Thus, the fact that Detective Gaultier was calling Defendant to arrange this polygraph, leaving messages, getting things ready; constitutes initiation on the part of the Police, post-appointment of counsel.

I think that this is an absolute violation of the

cases cited by the Supreme Court. It's an absolute violation of Bladel (After Remand); absolute violation of Michigan v Jackson.

I think it's also very, very important that there was an arrest warrant out for this offense, and I think we need to be clear. The record will show that it wasn't for drunk driving, or something. It was for this offense -- at the date Detective Gaultier picked up Defendant; in his own words; had him come to the station, and talked with him.

Whether someone volunteers to take a polygraph, is very different when they know that there's an arrest warrant out for them, than if they don't know that there's an arrest warrant out for them. And, what happened here was Police conduct that involved withholding that information in order to elicit incriminating statements from the Defendant. If the Defendant initiated the polygraph, it's arguable that it was only initiated because he didn't know that there was an a warrant -- a warrant out for him. And, I think that that is highly relevant to the total analysis in this case.

I think, secondly, I would argue that it's been shown Detective Gaultier did initiate as to this polygraph, post-appointment of counsel and that's the very narrow consideration that Bladel (After Remand) speaks

of.

I think that we need to think about the initiation question in terms of a continuing question. I think that if we limit ourselves to merely looking at who spoke first; the Defendant or the Police; you're getting into a very, very limited analysis. And, I don't think that that's what these cases stand for.

If I would cite the Court, I'd cite the Court to People v Bladel (After Remand), page 63, where the Court discusses the inequality in Police and Prosecutors and the Judiciary, versus an uninformed Defendant. And, the Court there says, "The simple fact that a Defendant requests an attorney indicates he does not believe he's sufficiently capable of dealing with his adversaries on his own."

That's exactly what we have here. So, the question of who spoke first is certainly not dispositive. Once the Defendant was taken to the polygraph, this hearing has established that additional cautions were not given. Certainly, the burden was placed on the Defendant. "Oh, if you feel uncomfortable, we'll stop." Those are standard Miranda types of warnings that are given, and that's perfectly fine and acceptable procedure.

However, our position is that the Sixth Amendment right is separate from, and subject to a much higher

standard.

THE COURT: Well, doesn't --

MS. DAGHER-MARGOSIAN: And --

THE COURT: -- doesn't Patterson versus Illinois say that that's not right.

MS. DAGHER-MARGOSIAN: Let's get to Patterson versus Illinois. Patterson versus Illinois, I think, is kind of a red herring, here. If you look at footnote three of Patterson versus Illinois; in that particular case, that Defendant did not have counsel while the interrogation was taking place. Counsel had not been accepted, or retained. There was no appointment of counsel in place. And in that regard, I think Patterson is totally distinguishable.

What we've got here is a Defendant that was interrogated, polygraphed, and questioned after the polygraph all the while having counsel, or at least for two-thirds of that time. That's very distinct from Patterson which on it's face, superficially, looks damaging to our position. It's not. It's totally distinguishable from our position, because in our case, the Defendant --

THE COURT: Well, what I --

MS. DAGHER-MARGOSIAN: -- had counsel.

THE COURT: What I find to be of interest in Patterson, of course, is the Court's discussion of the compre-

hensiveness of rights given under the Fifth Amendment as they implicate Sixth Amendment rights, which is in contradistinction, I think, to the earlier Supreme Court case -- what's the Michigan case?

MS. DAGHER-MARGOSIAN: The Michigan case?

THE COURT: The one --

MS. DAGHER-MARGOSIAN: Michigan v Jackson.

THE COURT: Right. Right. I mean, they do seem to be drawing some real distinctions in Jackson that they back away from in Patterson.

MS. DAGHER-MARGOSIAN: But they don't make clear distinctions, and they certainly say that if you're appointed counsel, you have full Sixth Amendment rights and that would indicate that Michigan v Jackson is governing. Patterson is not controlling here, because he did not have counsel appointed at that time. You know, maybe, in future cases that will happen, but that hasn't happened yet. And, I think that we're governed, certainly, by those earlier rulings.

I think another thing that -- that was very important is that the Prosecutor apparently was not made familiar with the polygraph arrangements. We had the trial attorney here, saying, "I wasn't ever informed. June 2nd, when I showed up for a..." -- I guess it's called a Pre-Pretrial -- "...I wasn't informed. I had no

knowledge that any sort of polygraph arrangements were being made, or that a polygraph was given discussed or administered."

I think that is very representative of the way that this initial investigation was done. It was done without informing the Prosecutor, so that he could properly inform his adversary, and that's exactly what these cases do not allow. The Sixth Amendment right -- and I know the Court has studied these cases and read these cases. The thrust of them is that the Sixth Amendment right is separate from, and more important than the general Fifth Amendment rights.

Why? Because I -- I think in People v Leonard, which is in the same volume, I think as Bladel (After Remand), it says, "Without the Sixth Amendment right, the Fifth Amendment rights have no importance or relevance, whatsoever."

We move on to the segment of our testimony that concerned the conversation in the -- in the car. And, I've argued that up and down for five years. I think it's rather clear that a second set of warnings needed to be given; not just Miranda, but a clear Sixth Amendment caution.

In this particular case, Detective Gaultier said, "I want to re-initiate some discussions with you. Do you

remember your rights?" That was an initiation. There was a drive. At trial, he testified that there was questioning; and I know the Court can take judicial notice, both of the transcript and sitting there; there was questioning. This statement, then, was brought up, and there was absolutely no discussion of right to counsel.

Now, there's no question that any experienced Police Officer knows that counsel had been appointed and up on the stand, today, Detective Gaultier indicated that he, indeed, knew that counsel had been appointed. So, I think it's very clear that even after the polygraph, a substantial appeared time elapsed. Two officers from two different departments were participating. I don't think that those initial polygraph warnings can be construed to carry over to that conversation in the car.

And, even if they were -- even if this Court found that they were, the only kind of warnings given to the Defendant at the polygraph by McMasters, were Fifth Amendment rights -- rather standard Fifth Amendment rights. And, "If you're uncomfortable, we'll stop." There was no significant caution.

THE COURT: But is that what Patterson versus Illinois permits?

MS. DAGHER-MARGOSIAN: I think that's the edge of

Patterson versus Illinois, your Honor, but once again, in Patterson there was no counsel appointed. Here, there was. And, counsel had been appointed for some time.

THE COURT: Okay. I'll agree with that. But, the man was indicted in Patterson. He didn't have a lawyer. Here, he's arraigned. There is a lawyer appointed to him with whom he hasn't met, but he's able to tell the polygraph operator, "Here's my lawyer's name.", in response to a specific question, or something. "Do you have a lawyer?", or, "You have a right to a lawyer." "Well, I've got a lawyer. Here's his name." "Well, if you want to talk to your lawyer, then we'll stop until you talk to your lawyer." The man says, "No. I don't want to do that."

MS. DAGHER-MARGOSIAN: Right. That's what the testimony showed, but what I think is operative is the kind of -- of language in Bladel (After Remand), "Unless a Defendant has spoken to a lawyer...". When the only individuals he has spoken to have been from the police community, how can the Defendant know how serious it is to take a polygraph, at all? The business of police is to elicit incriminating statements.

Certainly, the burden is on police to make known, at least through the Prosecutor, but probably to the defense lawyer, "We want to conduct a polygraph on your client."

and -- and that is really, in my view, where this case rests. And, I think that is distinguishable and extends well beyond Patterson. I think this is -- is offensive to the point where this Court and the higher Courts really can't countenance it, and it -- it colored and tainted the rest of the -- the proceedings because that statement came in.

THE COURT: Does it make any difference in this case, unlike Patterson, that his statement is really exculpatory in nature, as opposed to very incriminating in Patterson?

MS. DAGHER-MARGOSIAN: I don't -- I don't think that any -- this came up at the Supreme Court, and the Prosecutor tried to argue it and although we don't have a record of that, the responses of the Justices, including Patty Boyle, was, "That's ridiculous that it wasn't a harmful statement." That --

THE COURT: Okay.

MS. DAGHER-MARGOSIAN: I mean, my view and -- and the view of the Justices in -- I guess we could debate it, but I think it was a very harmful statement.

THE COURT: Okay.

MS. DAGHER-MARGOSIAN: That would conclude my remarks, your Honor.

THE COURT: Okay. Well, I appreciate the argument.

In my view, these decisions are decided and determined on the margins of the existing law. This thing has been sent back to me, as I understand my obligation, to determine facts relating to the questions posited to me by the Supreme Court and I don't want to attempt, from the bench, a factual recitation based upon this testimony, even though it was very brief, because I don't want to leave something out or misstate something. So, I'm going to have to take it under advisement and issue an opinion which I will attempt to do, forthwith, as soon as I have the opportunity to thoroughly review my notes.

The initial question is, "Did the Defendant initiate the request for the polygraph?" As to that, I think the record is uncontroverted that he did. Now the circumstances under which he did it are arguable as a matter of policy and how that effects the rest of the proceedings and will be good fodder back at the Supreme Court, I'm certain.

But as to that issue, would you take the position, Ms. Margosian, that there's anything in the record to the contrary, but that he initiated the request for the polygraph? I mean, I'd be a happy guy if you said, "No. That's not the way it is, Judge. Find the other way.", because then I'd just send it back, "No, he didn't." But, I think he did, based on what has been testified to.

MS. DAGHER-MARGOSIAN: Well, I think, Judge, as I -- as I've said before -- I mean, I think -- I think it's oversimplifying to say, "Yes, or, No. He initiated the polygraph." He brought it up, but I -- I would submit to you that the initiation that counts for purposes of this case, is the initiation made by Detective Gaultier after the --

THE COURT: Okay.

MS. DAGHER-MARGOSIAN: -- the Defendant received counsel.

THE COURT: Let me try and -- let me -- I -- simply because I don't want to do any work that I don't have to, here, if you've got something persuasive the other way. I've got other things, as I'm sure we all do.

The record is clear, in my view, that Gaultier talked to him; and this is the part that I'm getting nervous about and don't want to do too much of; on 5/23, in the a.m., in the Detective's room at the Sheriff's Department, Kalkaska, Michigan. He's focused on him. A warrant has issued, but not been served on him. He sees him downtown, has him come in for a discussion. That's the scenario. In the course of the discussion, Mr. Anderson says, "I want to take a polygraph.", or, "I will take a polygraph.", or, "Can I take a polygraph?"

Now, what the Supreme Court said to me is, "Judge,

you tell us: Did he initiate the request for the polygraph?" On its black and white face; yes, he did. Was he put in a position to do it by the officers? Sure. But -- but he's the one that initiated the request. So, if I answer that "Yes.", then I have to go on to decide whether or not he waived his Sixth Amendment rights at the examination, and whether or not that extended to the activity in the car, which is what I will undertake to do.

But, do you have any disagreement with my facial observation that the testimony and the record reflects --

MS. DAGHER-MARGOSIAN: Well, until you -- to me, the word 'initiate' here carries a real value. I would agree with your recitation of the facts, Judge.

THE COURT: Okay. That's the way I'm going to put it down, and then I'll go on to the other questions. Okay. Anything else?

MS. DAGHER-MARGOSIAN: No, nothing from me.

THE COURT: Okay. Thank you.

MS. DAGHER-MARGOSIAN: Thank you, Judge.

THE COURT: I'll get this opinion out immediately.

COURT CLERK: All rise.

THE COURT: Thank you. We're adjourned.

(At 3:37 p.m., proceedings concluded)

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STATE OF MICHIGAN)
)
COUNTY OF KALKASKA)

I, Marlene M. Ritter, Official Court Recorder of the 46th Circuit Court, State of Michigan, do hereby certify that the foregoing pages, one through seventy, inclusive, comprise a complete, true and accurate transcript, to the best of my ability, of the proceedings and testimony taken in the matter of the People of the State of Michigan versus James King Anderson, III, File Number 88-905-FC(D), on Thursday, May 12, 1994.

May 15, 1994

Marlene M. Ritter

Marlene M. Ritter, CER-4249
Official Court Recorder
107 South Roberts Road
Grayling, Michigan 49738
(517) 348-7750

No. 94-922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

V

James King Anderson III,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

TRICIA A. McNABB, being first duly sworn, deposes and says that on , she filed with this Court the following:

MOTION TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
PROOF OF SERVICE

and she mailed one (1) copy of same to:

Prosecuting Attorneys Appellate Service
6520 Mercantile Way, Ste. 2
P. O. Box 30218
Lansing, MI 48909

TRICIA A. McNABB

Subscribed and sworn to before me
January 19, 1995.

KAY M. HAMMING
Notary Public, Ingham County, Michigan
My commission expires: 11/22/98

IDEN NO. rb12158sp
Ronald J. Bretz